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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners,*

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT	5
REASONS FOR GRANTING THE WRIT	14
CONCLUSION	31

TABLE OF CITATIONS

CASES:

Aerojet-General Corp. v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 25
Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 (1937) 16
American Servicemen's Union v. *Mitchell*, 54 F.R.D. 14 (D.D.C. 1972) 28
Baker v. *Carr*, 369 U.S. 186 (1962) 16
Cherokee Nation v. *Hitchcock*, 187 U.S. 294 (1902) ... 24
Chrysler Corp. v. *Brown, et al.*, No. 77-922 (argued Nov. 8, 1978), 47 U.S.L.W. 3330 15
Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 29
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 26
Edwards v. *Schlesinger*, 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom. Waldie* v. *Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) 28
Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973) 28
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 404 F. Supp. 352 (D. Del. 1975) 8-9
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 438 F. Supp. 208 (D. Del. 1977) 10
GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (D. Del. 1977) 9

Page

Juidice v. *Vail*, 430 U.S. 327 (1977) 16
Kerotest Manufacturing Co. v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952) 28, 29
Lapin v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964) 29-30
Link v. *Wabash R.R.*, 370 U.S. 626 (1962) 19
Mann Manufacturing, Inc. v. *Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) 30
Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) 16
Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (per curiam) 6, 16-17
National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940) .. 26
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 16
Parklane Hosiery Co. v. *Shore*, —— U.S. ——, 99 S.Ct. 645 (1979) 26
Pepsico, Inc. v. *FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) 26
Pharmaceutical Manufacturers Association v. *Food and Drug Administration, et al.*, C.A. No. 77-291 (D. Del.) 23
Pierce & Stevens Chemical Corp. v. *Consumer Product Safety Commission*, —— F.2d ——, No. 78-6135 (2d Cir. December 14, 1978) 19
Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 21, 24
St. Louis Amusement Co. v. *Paramount Pictures, Inc.*, 61 F. Supp. 854 (E.D. Mo.), *appeal dismissed*, 326 U.S. 680 (1945), *aff'd on other grounds*, 168 F.2d 988 (8th Cir. 1948) 30
Southwest Airlines Co. v. *Texas International Airlines*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 25
Steelman v. *All Continent Corp.*, 301 U.S. 278 (1937) .. 29
Torquay Corp. v. *Radio Corp. of America*, 2 F. Supp. 841 (S.D.N.Y. 1932) 29, 30
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 16
United States v. *Citizens National Trust & Savings Bank*, 166 F. Supp. 410 (S.D. Cal. 1958), *aff'd*, 270 F.2d 128 (9th Cir. 1959) 30
Velsicol Chemical Corp. v. *Monsanto Co.*, 579 F.2d 1038 (7th Cir. 1978) 30

Page

STATUTES:

United States Constitution, Article III, Section 2 ..4, 15, 16
Consumer Product Safety Act, 15 U.S.C. § 2051 *et. seq.* (1976) 25
Section 6, 15 U.S.C. § 2055 8
Freedom of Information Act, 5 U.S.C. § 552 (1976) .....*passim*
18 U.S.C. § 1905 (1976) 8
28 U.S.C. § 1254(1) (1976) 2
28 U.S.C. § 1391(e) (1976), P.L. 87-748, 76 Stat. 744 (1962) 22
Rule 19, FED. R. CIV. P. 10, 24, 26
Rule 23, FED. R. CIV. P. 28

MISCELLANEOUS:

S. REP. No. 1992, 87th Cong., 2d Sess. (1962) 22
7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1760 (1972) 28

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on December 22, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (A.1-A.24) of which review is sought has not yet been reported. The original opinion and judgment of the Court of Appeals (A.44-A.59), which this Court summarily vacated on granting certiorari (A.64), 434 U.S. 1030 (1978), is reported at 561 F.2d 349, *reh. denied,* 565 F.2d 721 (D.C. Cir. 1977) (per curiam). The opinion of the United States District Court for the District of Columbia (A.32-A.42) is reported at 400 F. Supp. 848 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1978, and this petition for certiorari is being filed within 90 days of that date. On January 23, 1979, the Court of Appeals granted a stay of its mandate to and including February 12, 1979 pending the filing of petitions for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976). Jurisdiction in the District Court was based on the Freedom of Information Act, 5 U.S.C. § 552 (1976).

QUESTIONS PRESENTED

(1) Does an action initiated pursuant to the Freedom of Information Act ("FOIA") to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not released the information solely because it has been permanently enjoined from doing so by another federal district court in separate litigation instituted against it by the suppliers of the information?

(2) Has a governmental agency "improperly withheld" information within the meaning of the FOIA (5 U.S.C. § 552(a)(4)(B)) where the defendant agency has not released the information sought by the plaintiffs solely because it has been permanently enjoined from doing so by another district court?

(3) Are two sophisticated requesters of information under the FOIA precluded from prosecuting an FOIA action to compel a governmental agency to release information where another district court has permanently enjoined the agency from publicly releasing the information and where the requesters purposely bypassed ample opportunities to intervene in the other district court?

(4) Is the Consumer Product Safety Commission—an agency charged with informing the public of consumer product safety hazards—as a matter of law an inadequate representative in a "reverse-FOIA" action of the interests of FOIA requesters, so that a permanent injunction entered in that action forbidding the Commission from disclosing specified information does not preclude the requesters who chose not to intervene from later prosecuting, in another district court, an FOIA action to compel the Commission to disclose the specified information?

(5) Has the Court of Appeals for the District of Columbia Circuit erred in setting its own district court on a collision course with a district court in another circuit by (a) directing its own district court to determine whether an agency should be compelled to release certain information under the FOIA when the district court in the other circuit has permanently enjoined the agency from releasing the information and (b) suggesting to its district court that it may enjoin the enforcement of the permanent injunction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States. . . ."

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

STATEMENT

Less than thirteen months after this Court summarily vacated in this action an earlier decision of the United States Court of Appeals for the District of Columbia Circuit petitioners are constrained to seek review of a second decision of the Court of Appeals. Once again that Court has remanded this action to the United States District Court for the District of Columbia for determination of whether certain information obtained by the Consumer Product Safety Commission ("CPSC") from the petitioners should be disclosed to plaintiffs-respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (collectively "the requesters") pursuant to the Freedom of Information Act ("FOIA"), even though the United States District Court for the District of Delaware has permanently enjoined such disclosure.

More particularly, just over a year ago, this Court remanded this case "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware . . ." (A.64). 434 U.S. 1030 (1978). That permanent injunction, entered in a "reverse-FOIA" case instituted against the CPSC by petitioners, prohibits the CPSC from disclosing to any member of the public the very information sought by the requesters in this case. Following this Court's remand, the Court of Appeals reconsidered the matter but now has reaffirmed its prior decision directing its District Court to decide the merits of the requesters' FOIA action, *i.e.*, whether the CPSC should disclose the information to them, notwithstanding the final injunction entered in the Delaware litigation. Significantly, the Court

went on to suggest that its District Court consider enjoining petitioners from enforcing the Delaware injunction if it reaches a conclusion contrary to that reached by the Delaware Court. It thus is apparent that the Court of Appeals views the final injunction entered in the Delaware litigation as virtually meaningless.

In reaching its decision, the Court of Appeals disagreed with its District Court, which originally dismissed this action because there was no "case" or "controversy" between the parties, since the plaintiff requesters and the defendant CPSC both desired the same result, *i.e.,* release of the information, and the CPSC had refrained from releasing the information to the requesters only because of outstanding orders in the Delaware litigation. The Court of Appeals' reversal of this ruling does violence to the "case" or "controversy" requirement of the United States Constitution, is squarely contrary to decisions of this Court, *e.g., Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 48 (1971) (per curiam), and should not be permitted to stand.

The Court of Appeals' decision also flies in the face of the FOIA itself, which only authorizes suits to obtain information being "improperly withheld" by the agency involved. Surely, refusing to disclose information because of a court order prohibiting disclosure of the information is not improper.

Moreover, in ordering the District of Columbia to forge ahead on a collision course with the District of Delaware, the Court of Appeals ran roughshod over established principles of comity and the finality of judgments of coordinate federal courts. Its decision

to permit the requesters to pursue their own FOIA action, despite their timely notice of and deliberate refusal to participate in the Delaware proceedings, ignores the lengthy and hard-fought battle that has already taken place between petitioners arguing against disclosure of the information and the CPSC arguing for its purported right to release the information and the purported right of the public, including the requesters, to obtain it. The decision will force petitioners to relitigate in the District of Columbia the dispute they finally have won in Delaware and creates for the CPSC the potential dilemma of facing two conflicting injunctions of different federal courts, one prohibiting and the other requiring release of the very same information. These are results that should not be countenanced by this Court.

The Court of Appeals' decision is of particular significance because of its impact on other FOIA and reverse-FOIA litigation. If upheld, the essential holding of this case—that those requesting information from a governmental agency under the FOIA are never bound by an order enjoining the agency from releasing the information unless they were parties to the reverse-FOIA case in which the injunction was entered —will render meaningless reverse-FOIA proceedings because of the impossibility of joining all actual and potential FOIA requesters in reverse-FOIA proceedings. The decision thus not only is erroneous but is of far-reaching impact and raises crucial questions meriting review by this Court.

The procedural history of this matter is complex, involving lengthy proceedings in two different federal district courts and two reviews by the Court of Appeals for the District of Columbia Circuit. Upon learn-

ing in April 1975 of the CPSC's final determination to release their submissions to the requesters purportedly pursuant to the FOIA, the manufacturers immediately brought suit in various federal judicial districts against the CPSC to enjoin the threatened disclosure on the grounds that such release was barred, *inter alia,* by exemptions to the FOIA, 5 U.S.C. § 552 (b) (1976); by Section 6 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055 (1976); and by a provision of the Criminal Code, 18 U.S.C. § 1905 (1976). The actions ultimately were consolidated before Chief Judge Latchum in the District of Delaware, most of them having been brought in that district and the actions filed elsewhere having been transferred there at the request of the CPSC.

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. Then, on October 23, 1975, after extensive briefing and argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the information "in any manner" pending further order of the Court on the ground that Section 6(b)(1)[1] of the CPSA prohibited disclosure (A.71-A.107). *GTE Sylvania, Inc.* v.

[1] This provision reads in relevant part:

> "The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this [Act]."

Judge Latchum found that the CPSC had deliberately subpoenaed unverified and inaccurate information, disclosure of which would be misleading to the public and unfair to the manufacturers (A.98-A.104).

Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and permanently enjoined disclosure of the information at issue (A.118-A.138; A.139-A.141). 443 F. Supp. 1152 (D. Del. 1977). The CPSC has appealed from Judge Latchum's permanent injunction (A.139-A.141) and the case is now pending in the United States Court of Appeals for the Third Circuit. Oral argument was held on January 8, 1979 and the case is under advisement.

Subsequent to the commencement of the manufacturers' actions and the entry of temporary restraining orders, the requesters instituted the instant action in the District of Columbia under the FOIA to compel the CPSC to release the accident information which had been submitted by the manufacturers and which was, as the requesters acknowledged in their complaint,[2] the subject of the Delaware litigation. On September 23, 1975, the United States District Court for the District of Columbia granted defendants' motions to dismiss the requesters' action on the grounds that (1) the complaint sought no relief against the television manufacturers and (2) there was no justiciable "case" or "controversy" between the requesters and the CPSC, since those parties agreed that the information at issue should be released to the requesters and thus were not true adversaries (A.32-A.42). *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission,* 400 F. Supp. 848, 851 (D.D.C. 1975). In dismissing the complaint, Judge Richey ruled that he

[2] *See* Para. 10 of the complaint (A.25-A.31, at A.29).

should not re-examine or countermand the temporary restraining orders entered in the Delaware litigation, which had been issued by a court of competent jurisdiction concurrent with that of his own (A.39-A.40). Judge Richey also explicitly noted the appropriateness of intervention by the requesters in the Delaware litigation (A.42). Rather than pursue this course, however, the requesters remained aloof from the proceedings in Delaware[3] and appealed the dismissal of their complaint to the United States Court of Appeals for the District of Columbia Circuit.

On July 5, 1977, the Court of Appeals (opinion by Wright, J. for a panel consisting of himself and Bazelon, C.J. and Robinson, J.) reversed Judge Richey's holding that there was no "case" or "controversy" and remanded the case with instructions for him to proceed promptly to determine "quite simply, whether

[3] The requesters are participating in the appeal from the Delaware injunction as *amici curiae* asserting that they were necessary or indispensable parties to the District Court proceedings under Rule 19 of the Federal Rules of Civil Procedure. They have asked the Third Circuit to vacate Judge Latchum's permanent injunction and to instruct the District Court either to dismiss the action or to transfer the litigation to the District of Columbia where they may be joined and where their own action is pending. While the requesters argued both in their briefs and in oral argument before the Third Circuit that they cannot be bound by the Delaware injunction since they were not parties to the proceedings which led to the injunction, they studiously avoided many invitations to intervene in the Delaware proceedings on the merits, including an invitation extended by Judge Latchum on September 15, 1977 in denying the CPSC's motion to transfer the Delaware cases to the District of Columbia (A.109-A.117, at A.112 n.9, A.114), 438 F. Supp. 208, 211 n.9, 212 (D. Del. 1977), and numerous invitations from the manufacturers. Nor did the requesters ever attempt to present to Judge Latchum the Rule 19 issue they now are pressing as *amici* on the CPSC's appeal from the Delaware injunction—whether by intervening, appearing as *amici*, or requesting the CPSC to raise the issue on their behalf.

or not the documents should in fact be disclosed" (A.44-A.59, at A.58). 561 F.2d 349 (D.C. Cir. 1977). The Court perceived the necessary "case" or "controversy" to exist in (1) a supposed disagreement between the requesters and the CPSC over whether the then outstanding preliminary injunction entered by Judge Latchum "unequivocally preclude[d]" the CPSC from providing the requesters with the information in question and (2) the Court of Appeals' suspicion that the CPSC did not really want to release the information because, in the Court's view, the CPSC's early conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A.53). The Court erroneously concluded that, in any event, the Delaware litigation had been abandoned and that the preliminary injunction was "dead" (A.57).[4] The Court also held that even if the preliminary injunction were still in existence, it could not be given preemptive effect because no private party re-

[4] In fact, the preliminary injunction was very much "alive." On August 20, 1976, the Delaware court had issued a "minute order" instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes" (A.108). The minute order provided:

> "Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necesary or desirable, any party may initiate in the same manner as if this order had not been entered." (A.108)

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding."

questing disclosure of the information had participated in the Delaware proceedings and, in the Court's view, the CPSC had not adequately represented the pro-disclosure position (A.58). Petitions for rehearing, together with suggestions for rehearing *en banc,* were denied (A.60-A.63), 565 F.2d 721 (D.C. Cir. 1977) (per curiam), but the Court of Appeals' mandate was stayed to allow the manufacturers to file a petition for a writ of certiorari.

On December 8, 1977, after the petition for writ of certiorari was filed, Judge Latchum issued the permanent injunction prohibiting release of the information at issue (A.139-A.141). This fact was promptly brought to the attention of this Court. On January 16, 1978, this Court granted the petition, summarily vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware . . ." (A.64). 434 U.S. 1030 (1978). On remand to the Court of Appeals, the requesters and the manufacturers both filed motions in January 1978 requesting a briefing schedule (A.65-A.69). However, no action was taken by the Court until September 20, 1978 when the parties were requested to submit memoranda setting forth their views as to the course the Court of Appeals should take in light of the remand by this Court and "to address with particularity the question whether the permanent injunction entered in *GTE Sylvania* v. *Consumer Product Safety Commission,* Civ. No. 75-104 (D. Del. Dec. 8, 1977), bars appellants [the requesters], who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed" (A.70).

On December 22, 1978 the Court of Appeals (Robinson, J. for a panel consisting of himself and Wright, C.J. and Bazelon, J.) issued its second opinion and judgment (A.1-A.24), again rejecting all of the manufacturers' arguments and remanding the case to the District Court for determination of whether the information should be disclosed to the requesters (A.23-A.24). The Court expressly adopted its prior position and reasoning that the complaint presented a constitutional "case" or "controversy" notwithstanding the entry of the Delaware permanent injunction (A.10).[5] It then concluded that neither principles of comity nor collateral estoppel barred the prosecution of the requesters' action as the requesters were not formal parties to the Delaware proceedings (A.12-A.16). In reaching this conclusion, the Court held that the CPSC could never represent the interests of FOIA requesters in a reverse-FOIA suit so as to preclude later litigation over the same information (A.12-A.14). Nor, in the Court of Appeals' view, did the requesters' purposeful failure to intervene in the Delaware proceedings preclude their collateral attack on the Delaware judgment, because "[t]o decide otherwise would force [a requester] to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester" (A.22), and since "Congress specified the sites proper for judicial consideration of FOIA claims" (A.22-A.23), "to allow submitters to

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[5] The Court did not address but implicitly also rejected the manufacturers' argument, first raised by the government in its initial brief in the Court of Appeals and later endorsed by the Solicitor General, that the information at issue had not been "improperly withheld" by the CPSC within the meaning of Section 552(a)(4)(B) of the FOIA.

force FOIA litigation to occur in other arenas would free the tail to wag the dog" (A.23). Recognizing that its holding set the District of Columbia Court on a collision course with the Delaware Court (A.16-A.17), the Court of Appeals blamed the CPSC for failing to join the requesters as parties to the Delaware proceedings under Rule 19, Fed. R. Civ. P (A.18-A.19), and claimed that the manufacturers could have avoided the problem by maintaining the Delaware suit as a "defendant class action against the Commission and all possible requesters" (A.17). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to "continue toward a decision on the merits" (A.23) and suggested that its District Court consider enjoining the manufacturers from enforcing their Delaware judgment against the CPSC if the District Court found that the failure to release the information was indeed improper (A.24).

The judgment of the Court of Appeals thus represents no change in position from its prior judgment which this Court summarily vacated on certiorari. As in its prior decision, the Court of Appeals has found a "case" or "controversy" where none exists and has ordered its District Court to proceed to the merits notwithstanding the Delaware permanent injunction. As we show below, this decision, if permitted to stand, will lead to chaos in the judicial administration of FOIA and reverse-FOIA actions, and therefore should be reviewed and reversed by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals presents crucial questions concerning the proper accommodation of FOIA and "reverse-FOIA" actions, namely, the

existence of the constitutionally requisite "case" or "controversy" between the parties, the proper interpretation of the FOIA where an agency has been enjoined from releasing information sought, and the preclusionary effect on nonparties of a final judgment prohibiting a governmental agency from releasing information sought under the FOIA. These questions—which are not presented by *Chrysler Corp.* v. *Brown, et al.,* No. 77-922 (argued Nov. 8, 1978), 47 U.S.L.W. 3330—are highly significant and in view of the growing volume of FOIA and reverse-FOIA litigation throughout the country are virtually certain to recur. They should be reviewed by this Court in order that subordinate courts may have guidance for the problems which will increasingly confront them.

The decision of the Court of Appeals for the District of Columbia Circuit in this case undermines the "case" or "controversy" requirement of Article III of the Constitution by contriving a disagreement between the parties over the meaning of a crystal clear injunction issued by a district court in another circuit. The decision unnecessarily sets the District of Columbia Court on a collision course with the Delaware District Court by holding (a) that a governmental agency improperly withholds records within the meaning of the FOIA even though the records are withheld solely because a federal court has enjoined release of the records in any manner, (b) that a judgment permanently enjoining release of information does not bar FOIA requesters from maintaining a later action in another court seeking release of the same information where the FOIA requesters purposely chose not to intervene in the first action, and (c) that a govern-

mental agency may never represent the interests of FOIA requesters in a reverse-FOIA action so as to bar later litigation by the requesters seeking release of the same information. Indeed, by asserting that the District of Columbia Court must proceed to the merits of this case and by suggesting that the District of Columbia Court consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC, the Court of Appeals has challenged the jurisdiction of the Delaware Court to enforce its final judgment.

We believe that the decision of the Court of Appeals raises issues of paramount importance concerning the proper judicial administration of FOIA and reverse-FOIA actions. The decision warrants review, if not summary reversal, by this Court.

1. Under the terms of Article III of the Constitution, a court may act only in actual "cases" or "controversies." *See Juidice* v. *Vail,* 430 U.S. 327, 331 (1977); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937). There must be a "substantial controversy, between parties having adverse legal interests," *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941), so as to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Accordingly, where parties "desire precisely the same result . . . [t]here is . . . no case or controversy within the meaning of Art. III of the Constitution." *Moore* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 47, 48 (1971) (per curiam).

In its December 22, 1978 opinion, the Court of Appeals expressly adopted (A.10) the holding and reasoning of its July 5, 1977 opinion that a justiciable "case" or "controversy" exists between the requesters and the CPSC notwithstanding the fact that the CPSC wants to release the information to the requesters and has made a formal determination to do so (A.52-A.54). The CPSC has always desired precisely the same result as the requesters, and the only reason the information was not released to the requesters is because the CPSC has been prevented from doing so by the restraining orders, preliminary injunction, and permanent injunction entered in the Delware litigation.[6] Thus, on its face, the decision of the Court of Appeals disregards fundamental principles of justiciability.

In its July 5, 1977 opinion the Court of Appeals attempted to circumvent the congruence of interest between the requesters and the CPSC in two ways, neither of which can withstand scrutiny. The Court first perceived a supposed disagreement between the requesters and the CPSC defendants as to whether the orders entered in the Delaware litigation "precluded" or "absolved" the CPSC from providing the requesters with the information they sought (A.52). But not one word in the requesters' complaint or briefs ever has questioned the meaning of any of the orders entered in the Delaware litigation or their binding

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[6] Indeed, as Judge Richey noted (A.39 n.14) in dismissing the District of Columbia action, the CPSC made this very representation in the District of Columbia Court, stating in paragraph 13 of its answer to the complaint that "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so."

effect on the CPSC. Certainly, there can now be no disagreement as to whether the permanent injunction [7] now in effect prevents the CPSC from releasing the accident information to the requesters. Clearly it does.

The Court of Appeals also based its finding of a "case" or "controversy" on its perception that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A.53). While the Court stated in its December 22, 1978 opinion that "we earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position for the reasons then stated" (A.10), it later referred to "the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy" (A.17). We assume that the latter statement implicitly disassociates the Court from its earlier charges against the CPSC. Moreover, it is clear that those charges have no foundation in fact [8] and are inappropriate as a matter of law. As the Court of Appeals itself

[7] Indeed, the December 22, 1978 remand order (A.23-A.24) itself recognizes that there can be no "controversy" as to the effect of the injunction. The remand order merely directs the District of Columbia District Court to resolve the underlying merits of the case before it, to determine whether the information should be released to the requesters, and, in effect, to determine whether the Delaware injunction should have been issued at all (A.23-A.24). The order even suggests that the District of Columbia Court consider enjoining the manufacturers from enforcing the Delaware injunction against the CPSC in the event that the District of Columbia Court decides that the information should be released (A.24).

[8] The petitions for rehearing filed with the Court of Appeals after its July 5, 1977 decision, particularly that of the CPSC, show how totally unjustified the Court of Appeals was in its attack on the CPSC's handling of the Delaware litigation. Of particular note is the Court of Appeals' completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders and its decision to withdraw its appeal from the preliminary injunction. The need for TRO's to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware Court was certain, and therefore opposition plainly would have been fruitless. Moreover, the CPSC felt it needed additional time fully to brief its position before any preliminary injunction hearing. The decision to withdraw the interlocutory appeal was made by the Solicitor General, who concluded that the appeal would clearly be futile. Nor is the failure of the CPSC to press for prompt final hearing in the Delaware litigation any basis for challenging the bona fides of its expressed desire to release the information. Rather, the decision not to press for entry of a final judgment in Delaware stemmed from the CPSC's hope that a favorable decision would be reached in the case of *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, No. 75-410 (W.D. N.Y.). In fact, the CPSC's litigation strategy appears completely justified because the Second Circuit reversed entry of a permanent injunction against the CPSC and rendered an opinion favorable to the CPSC's position in the Delaware litigation. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, No. 78-6135 (2d Cir. December 14, 1978). Earlier, the same Court had affirmed by oral opinion, 578 F.2d 1369 (2d Cir. 1978), the issuance of a preliminary injunction in *Pierce & Stevens*. 439 F. Supp. 247 (W.D.N.Y. 1977).

recognized in its July 5, 1977 opinion (A.54 n.27), the litigation strategy of a party, even if incorrect, is simply not a matter for consideration by an appellate court. *See Link* v. *Wabash R.R.*, 370 U.S. 626, 633-34 (1962). In any event, the desire of the CPSC to release the information to the requesters is itself sufficient to establish that there is a lack of adverseness between the parties.

The Court of Appeals' "case" or "controversy" holding sets a dangerous precedent for other courts that, if allowed to stand, will result in a proliferation of litigation. For example, the decision will allow a person to circumvent a federal court's injunctive order against him by arranging for another interested person to bring suit in a different federal court to have the first person ordered to do what he actually desires to do but cannot do without violating the injunction issued in the first court. The decision will also enable any individual who does not like a particular court's order in a litigation to try to bypass the order by starting an action in another court he considers to be more favorably disposed to his position.

2. By ordering the District of Columbia Court to determine whether the accident information should be disclosed, the Court of Appeals implicitly rejected the manufacturers' argument, supported by the Solicitor General in his opposition (p. 5) to the manufacturers' first petition for a writ of certiorari, that the requesters' action could not be maintained because the information at issue was not being "improperly withheld" within the meaning of § 552(a)(4)(B) of the FOIA. Under the FOIA, a district court only "has jurisdiction . . . to order the production of any agency records improperly withheld" and "the burden [of proof] is on the agency to sustain its actions" in withholding the records. 5 U.S.C. § 552(a)(4)(B)(1976).

The CPSC has never claimed that the documents at issue in this litigation are exempt from disclosure pursuant to one of the exemptions to the FOIA. To the contrary, the CPSC has refused to disclose the documents to the requesters only because a court of compe-

tent jurisdiction has enjoined the CPSC from disclosing the documents to the public. The refusal of the CPSC to disobey the Delaware injunction cannot, as a matter of law, constitute improper withholding of documents and, accordingly, the Court of Appeals erred in holding to the contrary. The decision will lead to an unnecessary proliferation of lawsuits and should not be upheld.

3. The Court of Appeals concluded that because the requesters were not formal parties to the Delaware proceedings, the entry of the Delaware permanent injunction did not bar them from proceeding with their District of Columbia action (A.20). In reaching this conclusion, the Court of Appeals recognized (A.22 & n.64) that it had decided an important question expressly reserved by this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114 (1968)—*i.e.,* whether a person can "be bound by the previous decision because, although technically a nonparty, he had purposely by-passed an adequate opportunity to intervene." 390 U.S. at 114. The Court of Appeals found that requesters would suffer "undue hardship" if required to intervene in reverse-FOIA proceedings because of what it viewed as a clear Congressional intention to limit "judicial consideration of FOIA claims" to specified districts[9] and its own perception that "to allow submitters to force FOIA litigation to occur in other arenas would free the tail to wag

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[9] 5 U.S.C. § 552(a)(4)(B) provides that an action to compel release of agency records improperly withheld under the FOIA may be brought in "the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia."

the dog" (A.22-A.23). The Court further stated that "[t]o decide otherwise would force [a requester] to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester" (A.22).

The Court of Appeals' concern that the forum chosen by the reverse-FOIA plaintiff may be "sympathetic to the submitter" is speculative. More significantly, however, Congress has provided by statute a choice of forum for plaintiffs in reverse-FOIA and other litigation where the government is a party defendant. Title 28 U.S.C. § 1391(e) (1976) gives a submitter of information a broad choice of venue, including the right to bring suit in the "home court." [10] Yet in its desire to intrude into the Delaware proceedings, the Court of Appeals completely ignored the significant policy of this statutory provision.

The history of this litigation cries out for reversal of the Court of Appeals' decision. The requesters—

[10] Prior to 1963, an action against an agency official normally could only be brought in the District of Columbia—the precise result sought now by the requesters. However, Congress amended the general federal venue statute, 28 U.S.C. § 1391, by adding a subsection (e) permitting a government official to be sued in any judicial district in which (1) the official resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. *See* P.L. 87-748, 76 Stat. 744 (1962). The legislative history of this landmark amendment shows that Congress was concerned about broadening the plaintiff's choice of venue in actions against the government and viewed the then current state of the law—which normally required that suit be brought in the District of Columbia—to be "contrary to the sound and equitable administration of justice." S. Rep. No. 1992, 87th Cong., 2d Sess. (1962).

two sophisticated and litigation oriented consumer groups—had notice [11] of the Delaware litigation almost from the time of its inception and made a deliberate choice [12] not to participate in that litigation and instead to concentrate their efforts on revitalizing their own FOIA action. It was not until after entry of the permanent injunction and appeal to the Third Circuit that the requesters, in a belated attempt to undermine the Delaware proceedings, finally filed a brief as *amici curiae* with the Third Circuit urging that the permanent injunction be vacated for failure to join the requesters as parties to the District Court proceedings

[11] While the Court of Appeals acknowledged that "[p]reclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation" (A.22 n.64), it proceeded to ignore the *undisputed* fact that the requesters here had such notice.

[12] That choice admittedly was made "for strategic reasons" (A.112 n.9) and not because of any undue hardship. In fact, no claim of hardship could be substantiated here in light of the fact that one of the requesters has sought to intervene in another action pending in the District of Delaware. Pharmaceutical Mfrs. Ass'n v. Food and Drug Administration, *et al.*, C.A. No. 77-291 (D. Del.) (September 23, 1977 Motion for Leave to Intervene as Defendants by Consumers Union of the United States, Inc., *et al.*).

Moreover, while the requesters originally argued before the District of Columbia District Court that the Delaware Court was a "hopelessly inappropriate and inconvenient forum" (*see* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment and In Opposition to Defendants' Motions to Dismiss or In The Alternative for Stay of Proceeding at 45), they later recanted on appeal and conceded that the inconvenience of the Delaware forum "may be minimal." *See* Brief of Plaintiffs-Appellants at 18.

and that the case either be dismissed or transferred to the District of Columbia.[13]

This case thus squarely presents the question expressly reserved by this Court in *Provident Tradesmens Bank* and is worthy of consideration by this Court. If the Court of Appeals' ruling is permitted to stand, an individual with an interest in the outcome of a litigation would be encouraged not to participate in that litigation because he could always institute a later

[13] Incidentally, in an attempt to "accommodat[e]" FOIA and reverse-FOIA suits (A.16), the Court of Appeals for the District of Columbia opined that the CPSC should have urged the Delaware Court to join the requesters as parties under Rule 19, Fed. R. Civ. P., so as to avoid duplicative litigation (A.17-A.20). Indeed, the Court of Appeals went so far as to state, by way of dictum, that the requesters were indispensable parties under Rule 19(b) to the Delaware proceedings and that the failure to join the requesters thus mandated dismissal of the Delaware actions (A.18-A.19). We know of no reverse-FOIA case where the requester has been joined as a party, much less where a court has held that a requester must be joined under Rule 19. The consequences of the Court of Appeals' dictum could be profound. First, every reverse-FOIA case in which a judgment has been entered for the submitter, without intervention of the requester, would be subject to attack. Second, where two requesters reside in different districts, the submitter would be denied a forum or, at the very least, would be forced to bring two lawsuits in order to obtain personal jurisdiction over each requester.

The Court's gratuitous comments concerning Rule 19 were made without the benefit of full briefing or argument, and were without legal foundation. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). Rather, the Rule 19 discussion appears to have been calculated to influence the decision of the Third Circuit, where the issue has been fully briefed and argued. In any event, if, as we believe, the requesters are "properly foreclosed by [their] failure to intervene in the [Delaware] litigation, then the joinder issue considered in the Court of Appeals vanishes, for any rights of [the requesters] have been lost by [their] own inaction." Provident Tradesmens Bank v. Patterson, *supra*, 390 U.S. at 114.

suit of his own if the first suit were not resolved to his satisfaction. Having deliberately failed to intervene in the Delaware litigation, despite the absence of any undue hardship in doing so, the requesters should not be permitted to make a collateral attack on an injunction entered as a result of that litigation. To permit the Court of Appeals' decision to stand will render meaningless the concept of final judgments in reverse-FOIA litigation.

4. In finding that the Delaware permanent injunction does not bar the instant action, the Court of Appeals also held that the CPSC may never represent the interests of FOIA requesters in reverse-FOIA actions so as to preclude a later collateral attack on a judgment prohibiting disclosure of the information sought (A.12-A.14). In so ruling, the Court of Appeals brushed aside cases cited by the manufacturers holding that citizens may be bound by litigation where their interests are represented by the government.[14] Instead, the Court reached the startling conclusion that a governmental agency favoring disclosure of information under the FOIA does not have a congruence of interest with FOIA requesters to whom the agency desires to release the information (A.12-A.13).

This holding is particularly egregious in the circumstances of this case. The CPSC is uniquely charged with informing the public of consumer product safety hazards, 15 U.S.C. § 2051 *et seq.* (1976), and has made a conscious choice to maintain a pervasive "openness"

[14] *See* Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 98, 101 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *see also* Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975).

policy. The FOIA requesters in this action were given every opportunity to intervene in the Delaware proceedings,[15] but instead chose to stand aloof from those proceedings and to limit their participation to the filing of a brief as *amici curiae* before the Third Circuit urging that the Delaware injunction be vacated for failure to join them as parties. Despite an explicit invitation from the manufacturers, the requesters refused to intervene on appeal from the Delaware injunction and to file a brief on the merits. Rather, twelve days after the FOIA requesters sought permission from the Third Circuit to file their brief on the Rule 19 issue, another consumer group aligned with the interests of the requesters, Consumer Federation of America ("CFA"),[16] moved for leave to file a brief as

[15] Indeed, one court has held, based on its interpretation of National Licorice Co. v. NLRB, 309 U.S. 350 (1940) and Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), that in an agency antitrust proceeding seeking to vindicate public rights against a private party, nonparties with an interest in the proceeding can be bound by the results of that proceeding if they had notice and an opportunity to intervene. Pepsico, Inc. v. FTC, 472 F.2d 179, 187-90 (2d Cir. 1972) (Friendly, J.), *cert. denied*, 414 U.S. 876 (1973). If, as in the *Pepsico* case, a private party can represent the interests of nonparties in an agency antitrust proceeding, surely the government agency also can adequately represent nonparties' interests, so as to bind those nonparties, where the nonparties bypassed an opportunity to intervene. *Compare* Parklane Hosiery Co. v. Shore, —— U.S. ——, 99 S.Ct. 645, 651-52 (1979), where this Court stated that a party's failure to intervene in an earlier proceeding may materially affect that party's right to assert offensive collateral estoppel in a subsequent proceeding.

[16] In its motion for leave to file a brief as *amicus curiae* with the Third Circuit (A.145-A.147), CFA described itself as "the largest consumer organization in the United States" "composed of over 225 national, state, and local consumer organizations" (A.145).

amicus curiae on the merits and was permitted to do so without objection from the manufacturers. Thus, even though the requesters believe that their interests have not been fully represented by the CPSC, it cannot be denied that their views on the merits of the Delaware injunction will be fully and fairly litigated before the Third Circuit through the combined efforts of the CPSC and CFA.

The holding of the Court of Appeals clearly warrants review by this Court because, if the decision is allowed to stand, a submitter of information to the government will never be able to obtain final relief by successfully prosecuting a reverse-FOIA action. Instead, a succession of future requesters could file suits seeking to compel release of the same documents subject to the prior judgment, arguing that none of them is bound by any prior judgment (whether entered in a FOIA action or a reverse-FOIA action) because none of them was a party to the action in which the judgment was entered. Under these circumstances, no one ever could impart sensitive information to a governmental agency with any assurance that it would be economically practicable to defend the confidentiality of the information.[17]

[17] The Court of Appeals claimed that the manufacturers could have achieved finality in the Delaware proceedings by naming the appellants-requesters as representatives of a defendant class consisting of "all possible requesters" (A.17). This contention was made without the benefit of any briefing or argument whatsoever and, in any event, is erroneous. First, a "class" of "all possible requesters" would be comprised of over 200 million persons since any person may at some unspecified future time request the documents at issue. It is clear that "the requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the

5. In setting its own District Court on a collision course with the Delaware Court, the Court of Appeals ignored long-standing principles of comity that mandate dismissal of this action, by (a) directing its own District Court to proceed to redetermine issues already decided by the Delaware Court (A.23-A.24) and (b) suggesting to its District Court that it consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC (A.24).[18] As we have

court to determine whether a particular individual is a member. This means that the class must not be defined so broadly that it encompasses individuals who have little connection with the claim being litigated. . . ." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1760 at 581-82 (1972); *see also* Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom.* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974) (denying certification of a class of all "past, present and future" female applicants to the U.S. Air Force Academy because it is "ill-defined" especially as to "future" members); American Servicemen's Union v. Mitchell, 54 F.R.D. 14 (D.D.C. 1972) (denying certification of a class composed of "all American citizens who have, do, or intend to advocate ideas, policies, and political positions which are unpopular, controversial, or who otherwise dissent from the ideas, policies, and political positions predominant in American society"). Second, it is doubtful that the appellants-requesters, much less a class, could be named as defendants, since only the CPSC can provide the relief sought by the manufacturers. Third, it would be impossible to give constructive "notice" to members of the class, because of its immense size, if the court deemed notice necessary to protect the absent members' rights. *See* Rule 23(d), Fed. R. Civ. P. Moreover, joining a defendant class would not ensure finality of the judgment, since it could be subject to collateral attack by an absent member on the ground that the class lacked adequate representation. *See* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

[18] While we acknowledge that in appropriate circumstances a court first acquiring jurisdiction may enjoin a party before it from proceeding to prosecute a later filed action, Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952), we have found no support for the Court of Appeals' suggestion that the *second* court acquiring jurisdiction (the District of Columbia Court) can enjoin a party from enforcing a *judgment* obtained in an earlier action. The only case cited by the Court of Appeals supports the former and not the latter proposition. *See* Steelman v. All Continent Corp., 301 U.S. 278 (1937), where the first court acquiring jurisdiction in a bankruptcy matter enjoined a party before it from *attempting* to obtain a judgment in a later filed action.

shown, this deliberate disregard by the Court of Appeals of the jurisdiction of the Delaware Court is totally unnecessary and warrants reversal by this Court. Neither the District of Columbia Court nor the Court of Appeals for the District of Columbia Circuit has any right or power to set aside the Delaware permanent injunction.

The doctrine of comity rests upon considerations of orderly judicial administration, including conservation of judicial resources and comprehensive disposition of litigation. *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976). When two federal courts are faced with the prospect of exercising concurrent jurisdiction over a controversy, "the general principle is to avoid duplicative litigation." *Id. See also Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

Considerations of comity are especially important where, as here, an injunction has been entered by the first court considering the matter. Courts are particularly wary of interfering with injunctive relief fashioned by another court. *E.g., Torquay Corp.* v. *Radio Corp. of America,* 2 F. Supp. 841 (S.D.N.Y. 1932), cited with approval in *Lapin* v. *Shulton, Inc.,* 333 F.2d

169 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964); *St. Louis Amusement Co.* v. *Paramount Pictures, Inc.,* 61 F. Supp. 854, 857 (E.D. Mo.), *appeal dismissed,* 326 U.S. 680 (1945), *aff'd on other grounds,* 168 F.2d 988 (8th Cir. 1948); *see also Mann Manufacturing, Inc.* v. *Hortex, Inc.,* 439 F.2d 403 (5th Cir. 1971); *Velsicol Chemical Corp.* v. *Monsanto Co.,* 579 F.2d 1038, 1050 n.19 (7th Cir. 1978). Nor does the applicability of the doctrine depend upon whether all of the parties to the second suit were parties to the original action. *E.g., United States* v. *Citizens National Trust & Savings Bank,* 166 F. Supp. 410, 412 (S.D. Cal. 1958), *aff'd,* 270 F.2d 128 (9th Cir. 1959); *Torquay Corp.* v. *Radio Corp. of America, supra.*

These principles demonstrate that one federal district court should not be permitted to interfere with an injunction entered by another federal court. Yet, this is precisely what the Court of Appeals decision contemplates.[19] The fact that the plaintiff requesters in this action were not parties to the Delaware litigation is irrelevant since the CPSC was a party, is bound by the Delaware Court's injunction, and cannot disregard it. If the plaintiff requesters wish to persist in their efforts to obtain the documents, their remedy is to take action in the Delaware Court to challenge or seek

[19] Indeed, the Solicitor General, in his opposition (p. 6) to the manufacturers' original petition for a writ of certiorari, stated that in light of the Delaware permanent injunction, "principles of comity should in our view preclude the District of Columbia court from proceeding with this litigation." However, the Solicitor General opposed review at that time because of his sanguine belief that entry of the permanent injunction constituted a "change in circumstances" which surely would be considered by the courts below. Unfortunately, the Solicitor General's views were in effect rejected by the Court of Appeals.

modification of the injunction. Proceedings in the District of Columbia Court whose sole objective is a ruling and order directly contrary to the Delaware Court's ruling and permanent injunction are totally unwarranted and cannot be permitted by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners*,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents*.

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TABLE OF CONTENTS OF APPENDIX.

	Page
Second Opinion of the Court of Appeals	A1
Complaint	A25
Opinion of the District of Columbia District Court	A32
Order of the District of Columbia District Court	A43
First Opinion of the Court of Appeals	A44
Order of the Court of Appeals Denying Rehearing	A60
Order of the Court of Appeals Denying Rehearing En Banc	A63
Order of the Supreme Court	A64
Manufacturers' Motion to Set Briefing Schedule in the Court of Appeals	A65
Requesters' Motion to Set Briefing Schedule in the Court of Appeals	A68
Order of the Court of Appeals Requesting Briefs	A70
Opinion of the Delaware District Court Granting Preliminary Injunction	A71
Minute Order Entered by the Delaware District Court	A108
Opinion of the Delaware District Court Denying Motions to Transfer	A109
Opinion of the Delaware District Court Granting Permanent Injunction	A118
Judgment and Permanent Injunction Entered by the Delaware District Court	A139
Requesters' Motion for Leave To File Amicus Brief on Rule 19 in the Third Circuit	A142
Consumer Federation of America's Motion for Leave To File Amicus Brief on the Merits in the Third Circuit	A145

Appendix.

SECOND OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC. et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Filed December 22, 1978

Before WRIGHT, *Chief Judge*, and BAZELON, and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: At the core of this litigation [1] is appellants' challenge [2] under the Freedom of Information Act (FOIA)[3] to the Consumer Product

1. Our earlier decisions are cited *infra* notes 4 and 9.

2. Because of the grounds on which our previous decisions rested, it was unnecessary to deal with the problems that are squarely presented now.

3. Pub. L. No. 89-554, 80 Stat. 383 (1966), *as amended*, 5 U. S. C. § 552(a)(3)-(e) (1976).

Safety Commission's failure to disclose data concerning accidents attributable to the operation of television sets. When their cause was first before us, we reversed the District Court's ruling that no case or controversy was presented.[4] That determination had been premised on the Commission's acknowledged willingness to release the data save for a ban imposed thereon by a preliminary injunction awarded television manufacturers by the District Court for the District of Delaware in a reverse-FOIA suit involving the same information.[5] We held that the Delaware action, to which appellants were not parties, was no obstacle to their effort in the District Court here.[6] We reasoned that a preliminary injunction is designed merely to preserve the status quo ante pending final decision, and " 'is not an adjudication of rights in any proper sense of the term. . . .' " [7] Because the Delaware court had entered an order "closing out" the case before any final stage had been reached, we concluded that the Delaware proceeding was not "an insuperable barrier to the suit at bar." [8]

We later were informed that the Delaware action had not really been terminated, but that the "closing out" order was apparently a means merely of placating the periodic call for statistics reflecting judicial efficiency in processing caseloads.[9] In denying rehearing, we noted that appellants had still not been added as parties to the Delaware proceedings, and explained that "[s]ince all

4. *Consumers Union v. Consumer Prod. Safety Comm'n,* 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977).

5. See *id.* at 356, 561 F. 2d 354.

6. *Id.* at 359, 561 F. 2d at 357.

7. *Id.* at 358, 561 F. 2d at 356, quoting *United States Elec. Lighting Co. v. Metropolitan Club,* 6 App. D. C. 536, 544 (1895).

8. 182 U. S. App. D. C. at 358, 561 F. 2d at 356.

9. *Consumers Union v. Consumer Prod. Safety Comm'n,* 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977).

necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA." [10]

Our prior opinions spurred the manufacturers to renew vigorously their pursuit of a judgment on the merits in Delaware, and appellants made no effort to have the District Court here enjoin them from that course. And the Commission, at long last, moved in the Delaware court for a change of venue to the District of Columbia, but added no alternative motion to join the FOIA requesters in the Delaware case—in which, we are now told, their rights have been fully and finally adjudicated. The Delaware court denied transfer primarily on the ground that, though the Commission faced the possibility of inconsistent outcomes on the merits, "[t]he time for the Commission to have moved for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here." [11]

While a petition to the Supreme Court for a writ of certiorari in this case was pending, the Delaware court issued a permanent injunction.[12] The Supreme Court subsequently granted certiorari and remanded the case to us "for further consideration in light of the permanent injunction." [13] Thus we are now brought face-to-face with the issue we had earlier reserved: Does a judgment in

10. *Id.*

11. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n,* 438 F. Supp. 208, 212 (D. Del. 1977). The court noted that "the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia." *Id.* at 211.

12. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n,* 443 F. Supp. 1152 (D. Del. 1977), *appeal pending,* No. 78-1328 (3d Cir.).

13. *GTE Sylvania, Inc. v. Consumers Union,* 434 U. S. 1030, 98 S. Ct. 761, 54 L. Ed. 2d 778 (1978).

favor of information-suppliers in a reverse-FOIA suit bar requesters not parties thereto from litigating their contention that the Freedom of Information Act mandates disclosure? [14] The answer, we think, becomes clear once one investigates the interrelationship of the Act and reverse-FOIA suits in light of traditional principles governing preclusion of subsequent litigation.

I. The Rationales for FOIA and Reverse-FOIA Suits.

Before the Freedom of Information Act was adopted, official dissemination of information was frequently marked by caprice,[15] and suits to obtain information or

14. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 359, 561 F. 2d at 357. After the remand, we called upon the parties for, and they submitted, supplemental memoranda setting forth their views as to the course the court should take, addressing particularly the question stated in text.

15. Section 3(c) of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 238 (1946), which the Freedom of Information Act replaced, provided that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." This section was perceived as "not intended to open up Government files for general inspection," Attorney General's Manual on Administrative Procedure Act 25 (1947), and agency responses to requests for information often evidenced an appreciation of secrecy for secrecy's sake. See S. Rep. No. 813, 89th Cong., 2d Sess. 3-5 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966); *EPA v. Mink*, 410 U. S. 73, 79, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119, 127-128 (1973); *Getman v. NLRB*, 146 U. S. App. D. C. 209, 217-218, 450 F. 2d 670, 678-679, *stay denied*, 404 U. S. 1204, 92 S. Ct. 7, 30 L. E. 2d 8 (1971); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 435-437 (1965). The breadth of agency discretion under § 3(c) was in no way curtailed by the courts, see, *e.g.*, *FCC v. Schreiber*, 381 U. S. 279, 293, 85 S. Ct. 1459, 1469, 14 L. Ed. 2d 383, 393 (1965); *cf. Appeal of SEC*, 226 F. 2d 501, 517-519 (6th Cir. 1955); but *cf. Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D. D. C. 1963), and that section had little practical effect on prior law. *Cf. United States ex rel. Stowell v. Deming*, 57 App. D. C. 223, 224, 19 F. 2d 697, 698, *cert. denied*, 275 U. S. 531, 48 S. Ct. 28, 72 L. Ed. 419 (1927).

to forestall its release met with "far from uniform" [16] judicial treatment.[17] The Act was intended to rationalize agency disclosure policies [18] by providing a mechanism for balancing the public's "right to know" against the agency's interest in preserving confidentiality.[19] If a court finds that the Act applies to material for which a request has been properly made,[20] that is the end of the matter; the

16. 1 K. Davis, Administrative Law Treatise § 3.13, at 227 (1958).

17. See cases cited *supra* note 15. See also the many cases dealing with the propriety of agency disclosure *sua sponte* or in the course of agency proceedings. *E.g.*, *FCC v. Schreiber*, *supra* note 15; *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U. S. 56, 59 S. Ct. 409, 83 L. Ed. 483 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); *FCC v. Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd on other grounds*, 241 F. 2d 81 (4th Cir.), *cert. denied*, 353 U. S. 957, 77 S. Ct. 863, 1 L. Ed. 2d 908 (1957). See generally *Appeal of SEC*, *supra* note 15, 226 F. 2d at 517-519 and cases there cited; J. Chamberlain, N. Dowling & P. Hays, The Judicial Function in Administrative Agencies 112-120 (1942); 1 K. Davis, Administrative Law Treatise § 3.13 (1958 & 1970 Supp.); Rourke, *Law Enforcement Through Publicity*, 24 U. Chi. L. Rev. 225, 242-247 (1957).

18. See, *e.g.*, S. Rep. No. 813 *supra* note 15, at 3:

> It is the purpose of the present bill . . . to establish a general policy of full agency disclosure unless information is exempted. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting informational policies.

19. *Id.* See also *EPA v. Mink*, *supra* note 15, 410 U. S. at 79-80, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128.

20. When no "request for identifiable records" has been made, the statute is not activated. 5 U. S. C. § 552(a)(3) (1976); see S. Rep. No. 813, *supra* note 15, at 2; *cf., e.g., Nader v. Volpe*, 151 U. S. App. D. C. 90, 93 n. 26, 466 F. 2d 261, 264 n. 26, 18 A. L. R. Fed. 595 (1972); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 131 U. S. App. D. C. 331, 341 n. 15 (1968) (concurring opinion). See also *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 555 F. 2d 82, 93-94 (3d Cir. 1977). But see *Pennzoil Co. v. FPC*, 534 F. 2d 627, 630 (5th Cir. 1976); *Continental Oil Co. v. FPC*, 519 F. 2d 31, 36 (5th Cir. 1975), *cert. denied*, 425 U. S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976); *Union Oil Co. v. FPC*, 542 F. 2d 1036, 1045 (9th Cir. 1976).

material *must* be disclosed,[21] for the Act effectuates a congressional judgment that in those circumstances no public or private interest in secrecy outweighs the benefits attending public access.[22] Moreover, in determining whether the Act is operative, the legislative command that disclosure be the rule and exemptions be narrowly construed [23] must be sedulously observed. But Congress in the same breadth specified classes of information to which the Act—and its policy of openness—"do[] not apply." [24] When a court finds that requested material

21. *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 147-148, 95 S. Ct. 1504, 1515, 44 L. Ed. 2d 29, 45-46 (1975).

22. S. Rep. No. 813, *supra* note 15, at 5-6; see, *e.g.*, *Getman v. NLRB*, *supra* note 15, 146 U. S. App. D. C. at 217-219, 450 F. 2d at 678-680; *Soucie v. David*, 145 U. S. App. D. C. 144, 154, 448 F. 2d 1067, 1077 (1971). See also *Department of the Air Force v. Rose*, 425 U. S. 352, 379 n. 17, 96 S. Ct. 1592, 1607 n. 17, 48 L. Ed 2d 11, 31 n. 17 (1976). See generally K. Davis, Administrative Law of the Seventies § 3A.6, at 61 (1976).

23. See *Department of the Air Force v. Rose*, *supra* note 22, 425 U. S. at 361, 96 S. Ct. at 1599-1600, 48 L. Ed. 2d at 21, citing *EPA v. Mink*, *supra* note 15, 410 U. S. at 79, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128; *Vaughn v. Rosen*, 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973), *cert. denied*, 415 U. S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), *aff'd after remand*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142, 28 A. L. R. Fed. 623 (1975); *Soucie v. David*, *supra* note 22, 145 U. S. App. D. C. at 157, 448 F. 2d at 1080.

24. 5 U. S. C. § 552(b) (1976); S. Rep. No. 813, *supra* note 15, at 3; see, *e.g.*, *Administrator v. Robertson*, 422 U. S. 255, 261, 95 S. Ct. 2140, 2145, 45 L. Ed. 2d 164, 170 (1975); *NLRB v. Sears, Roebuck & Co.*, *supra* note 21, 421 U. S. at 137, 95 S. Ct. at 1510, 44 L. Ed. 2d at 39; *EPA v. Mink*, *supra* note 15, 410 U. S. at 74, 93 S. Ct. at 830, 35 L. Ed. 2d at 125. Since the Act is "not a withholding statute but a disclosure statute," S. Rep. No. 813, *supra* note 15, at 5; see S. Rep. No. 584, 93d Cong., 2d Sess. 6 (1974); H. R. Rep. No. 1419, 92d Cong., 2d Sess. 7 (1972), the mere fact that information falls within one of its exemptions does not of itself outlaw disclosure. See *Planning Research Corp. v. FPC*, 181 U. S. App. D. C. 33, 36-37 n. 4, 555 F. 2d 970, 973-974 n. 4 (1977), citing S. Rep. No. 584, *supra*, at 6 and *Charles River Park "A", Inc. v. HUD*, 171 U. S. App. D. C. 286, 293, 519 F. 2d 935, 942 (1974) and K. Davis, Administrative Law of the Seventies § 3A.5, at 58-61 (1976) and K. Davis, Administrative Law Treatise

falls into one of these categories, and resultantly that its divulgence is not compelled by the Act, the propriety of voluntary disclosure by the agency must hinge on reconciliation with such other law as is pertinent—whether statute, regulation, the administrative "common law" or general principles of equity.[25]

Some of these residual legal rules may endow private parties with legally cognizable interests in the confidentiality of exempted information; others may bestow on some a greater entitlement to information than the Act itself gives the general public.[26] Since the agency's pur-

24. (Cont'd.)
§ 3A.5, at 122 (1970 Supp.); *Chrysler Corp. v. Schlesinger*, 565 F. 2d 1172, 1185 (3d Cir. 1977), *cert. granted*, 435 U. S. 914, 98 S. Ct. 1466, 55 L. Ed. 2d 504 (1978); *Superior Oil Co. v. FERC*, 563 F. 2d 191, 204 (5th Cir. 1977); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit*, 55 Texas L. Rev. 587, 598-600 (1977); *cf.* Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. 1, 5-6 (1976); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1158-1159 (1975); Comment, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. L. Rev. 995, 1010-1011 (1976). See also *Associated Dry Goods Corp. v. EEOC*, 419 F. Supp. 814, 821 (E. D. Va. 1976). But *cf. Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U. S. 924, 97 S. Ct. 2199, 53 L. Ed. 2d 239 (1977); *McCoy v. Weinberger*, 386 F. Supp. 504, 508 (W. D. Ky. 1974).

25. See, *e.g.*, *Planning Research Corp. v. FPC*, *supra* note 24, 181 U. S. App. D. C. at 36-37 n. 5, 555 F. 2d at 973-974 n. 5, quoting K. Davis, Administrative Law Treatise § 3A.5, at 122 (1970 Supp.); *Charles River Park "A", Inc. v. HUD*, *supra* note 24, 171 U. S. App. D. C. at 140-141, 519 F. 2d at 941-942; *Chrysler Corp. v. Schlesinger*, *supra* note 24, 565 F. 2d at 1192; *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, 542 F. 2d at 1197-1198; *GSA v. Benson*, 415 F. 2d 878, 880 (9th Cir. 1969). But *cf. Babcock & Wilcox Co. v. Rumsfeld*, 70 F. R. D. 595, 601 (N. D. Ohio 1976).

26. Compare, *e.g.*, *United States v. Nixon*, 418 U. S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) with *EPA v. Mink*, *supra* note 15, 410 U. S. at 86-88, 93 S. Ct. at 835-836, 35 L. Ed. 2d at 131-133.

poses will only coincidentally correspond with those of nongovernmental parties, it would be folly to entrust these often-critical private interests [27] to unreviewable bureaucratic discretion. This court has accordingly held that when an agency asserts its intention to comply with a demand for information, parties who would be aggrieved by compliance may sue for a declaration whether that release would be lawful.[28] But such litigants must

27. At least one reverse-FOIA action has been brought by individuals seeking to prevent disclosure to business concerns of confidential information about them. *Sonderegger v. United States Dep't of Interior*, 424 F. Supp. 847 (D. Idaho 1976) (request of claim files on each victim in Teton Dam disaster). Many other FOIA cases, mostly turning on the scope of 5 U. S. C. § 552(b)(6) (1976), indicate that requesters may desire information about "little people." *E.g., Department of the Air Force v. Rose, supra* note 22, 425 U. S. at 373-376, 96 S. Ct. at 1606-1607, 48 L. Ed. 2d at 28-30 (Air Force Academy disciplinary records); *Rural Housing Alliance v. United States Dep't of Agriculture*, 162 U. S. App. D. C. 122, 126, 498 F. 2d 73, 77 (1974) ("information regarding marital status, legitimacy of children, identity of fathers . . . , medical condition, welfare payments, alcoholic consumption, family fights, and so on"). *Ackerly v. Ley*, 137 U. S. App. D. C. 133, 136, 420 F. 2d 1336, 1339 (1967) (medical records); *Wine Hobby U. S. A., Inc. v. Internal Revenue Serv.*, 502 F. 2d 133, 136-137 (3d Cir. 1974) (names, addresses, family status, and personal activities within the home); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D. D. C. 1977), *aff'd*, No. 77-1504 (D. C. Cir. Apr. 18, 1977) (names and addresses of former military officers who retired with a disability); *Columbia Packing Co., Inc. v. United States Dep't of Agriculture*, 417 F. Supp. 651, 654 (D. Mass. 1976), *aff'd*, 563 F. 2d 495 (1st Cir. 1977) ("a detailed synopsis of each individual's career within the [government], data about family relationships, financial information and medical records"); *cf. Ditlow v. Schultz*, 170 U. S. App. D. C. 352, 517 F. 2d 166 (1975). Surely these individuals should not be without recourse to judicial review of agency action so deeply affecting their privacy. See generally, Hulett, *Privacy and the Freedom of Information Act*, 27 Ad. L. Rev. 275 (1975); Project, *supra* note 24, 73 Mich. L. Rev. at 1161-1162, 1336-1338.

28. *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 141, 519 F. 2d at 942; see *Planning Research Corp. v. FPC, supra* note 24, 181 U. S. App. D. C. at 40-41, 555 F. 2d at 977-978. See also *Sears, Roebuck & Co. v. GSA*, 180 U. S. App. D. C. 202, 204-205, 553 F. 2d 1378, 1380-1381 (1977).

first pass through the needle's eye of the Freedom of Information Act,[29] for if the Act calls for disclosure they have, of course, no right whatsoever to confidentiality.[30] Only if the Act does not govern need the court examine other sources of law—which may prohibit dissemination, give the agency judicially reviewable or unreviewable discretion to release or retain, or even mandate disclosure, depending on the circumstances.[31]

Reverse-FOIA suits therefore are no blight upon the landscape of the law, but the propriety of their role in any scenario must be carefully considered. Enforcement of such rights of confidentiality as federal law might otherwise recognize must not be allowed to choke the free flow of data contemplated by Congress in the Freedom of Information Act. Surely such an obstruction would be interposed if a judgment adverse to the agency in a reverse-FOIA action were permitted to bar later FOIA suits for the documents in question when no one interested in obtaining the material was a party to the earlier litigation. In our view, no such preemption is warranted, as this case tellingly exemplifies.

II. Theories for Preclusion of Subsequent FOIA Suits

Federal courts in different jurisdictions may sometimes reach conflicting conclusions on the duties of an ad-

29. *Sears, Roebuck & Co. v. GSA, supra* note 28, 180 U. S. App. D. C. at 205, 553 F. 2d at 1381, citing *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 291-292 n. 4, 294 n. 10, 519 F. 2d at 940 n. 4, 941 n. 10 and *Westinghouse Elec. Corp. v. Schlesinger, supra* note 24, 542 F. 2d at 1208 n. 57.

30. See note 22 *supra*.

31. See cases cited *supra* note 23; *GSA v. Benson, supra* note 25, 415 F. 2d at 880, (alternative holding that agency is bound by regulation specifying that even if requested material is exempt, it should be released absent a compelling reason for nondisclosure); *cf.* S. Rep. No. 584, *supra* note 24, at 6; H. R. Rep. No. 1419, *supra* note 24, at 7 (approving regulations similar to those invoked in *Benson*); Drachsler, *supra* note 24, 28 Ad. L. Rev. at 2, 9-11.

ministrative agency, but normally without placing it in an impossible dilemma or bringing on a direct clash of judicial power. A serious conundrum, however, arises when, as here, the subject matter is information and the dispute is over whether it should be disclosed to the public. Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere. Consequently, the first court to decide—in either a FOIA or a reverse-FOIA suit—will have pronounced a judgment that might reach across the Nation, or, on the other hand, might not have any practical effect even in its own jurisdictional domain.

That is exactly the situation here. The Delaware proceeding began, and the Commission was temporarily enjoined, before the appellant-requesters filed their own action in the District of Columbia seeking disclosure. By the time appellants sued, the District Court here knew that should the litigation before it continue, a decision contrary to that of the Delaware court might be reached, and that the Commission could not possibly comply with each of the conflicting orders.

Thus focused, the issue is the proper response of the court chronologically second. We earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position [32] for the reasons then stated.[33] That still leaves other alternatives—dismissal

32. See *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

33. In the Supreme Court, the Commission stated, contrary to its argument here, that it had become "persuaded . . . that a case

on a theory of *stare decisis,* collateral estoppel or comity, or continuation of the suit in some manner. For more than ample reason, we have chosen the latter course.

A. *Stare Decisis.*

We surely do not gainsay that "the doctrine of stare decisis is still a powerful force in our jurisprudence." [34] So, a court resolving a FOIA claim may choose to defer to a previous judicial decision that the Act does or does not apply to particular documents,[35] whether the prior action sought disclosure or restraint. It has not, however, been our experience that federal judges are either careless or timorous. The notion that any would defer on *stare decisis* grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment.[36]

33. (Cont'd.)
or controversy, within the meaning of Article III, exists between the requesters and the Commission." Brief for Federal Respondents in Opposition to Petition for a Writ of Certiorari, at 5, *GTE Sylvania, Inc. v. Consumers Union, supra* note 13.

34. *United States v. Maine,* 420 U. S. 515, 527, 95 S. Ct. 1155, 1161, 43 L. Ed. 2d 363, 371 (1975).

35. See generally, Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies,* 55 N. C. L. Rev. 123 (1977). But *cf. Robertson v. Department of Defense,* 402 F. Supp. 1342, 1346-1347 (D. D. C. 1975).

36. See *City Stores Co. v. Lerner Shops of District of Columbia, Inc.,* 133 U. S. App. D. C. 311, 315, 410 F. 2d 1010, 1014 (1969) ("[d]ecisions of district courts and other courts of appeal are, of course, not binding on us and are looked to only for their persuasive effect"; "[i]f they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number"); *Watson v. Allen,* 103 U. S. App. D. C. 5, 10, 254 F. 2d 342, 347 (1958), *later appeal,* 107 U. S. App. D. C. 25, 274 F. 2d 87 (1959), (decisions of other courts of appeals "are persuasive and entitled to deference but are not authoritatively binding"). See generally, Vestal, *supra* note 35, 55 N. C. L. Rev. at 130-136. But see Comment, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals,* 85 Yale L. J. 1219 (1978).

B. *Collateral Estoppel.*

Furthermore, the doctrine of collateral estoppel, which does bind parties to a previous suit to such determinations of material issues as are encompassed in the judgment,[37] only rarely precludes nonparties from litigating the same issues afresh.[38] If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts.[39]

The only parties here who were litigants in Delaware are the Consumer Product Safety Commission and the manufacturers who sought to prevent disclosure of materials that the Commission was prepared to turn over to appellants. An agency's interests in FOIA suits of either

37. See, *e.g., Nixon v. Richey,* 168 U. S. App. D. C. 172, 180 n. 75, 513 F. 2d 430, 438 n. 75 (1975), and cases cited therein; *Wolfe v. Froehlke,* 358 F. Supp. 1318, 1319 (D. D. C. 1973), *aff'd,* 166 U. S. App. D. C. 274, 510 F. 2d 654 (1974). See generally, Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27 (1964).

38. See, *e.g., Sea-Land Servs., Inc. v. Gaudet,* 414 U. S. 573, 593-595, 94 S. Ct. 806, 819, 39 L. Ed. 2d 9, 25-26 (1974), citing, *inter alia, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation,* 402 U. S. 313, 320-327, 91 S. Ct. 1434, 1439-1442, 28 L. Ed. 2d 788, 795-799 (1971); Vestal, *supra* note 37, 50 Iowa L. Rev. at 63-64; *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 855-856 (1952). See also *Hansberry v. Lee,* 311 U. S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940). We are cognizant of isolated decisions of lower federal courts advancing bold new rules for preclusion of nonparties, which have been hailed by commentators as a sign of things to come. See generally McCoid, *A Single Package for Multiparty Disputes,* 28 Stan. L. Rev. 707 (1976); Vestal, *Res Judicata/Preclusion: Expansion,* 47 S. Calif. L. Rev. 357 (1974); Vestal, *Claim Preclusion and Parties in Privity:* Sea-Land Services v. Gaudet *in Perspective,* 60 Iowa L. Rev. 973 (1975). We take no view on these developments, for they do not apply to the situation under discussion here, in which by no means did appellants have a "vicarious day in court." Note, *Collateral Estoppel of Non-parties,* 87 Harv. L. Rev. 1485, 1500 (1974).

39. See *Wolfe v. Froehlke, supra* note 37, 358 F. Supp. at 1319; *Robertson v. Department of Defense, supra* note 35, 402 F. Supp. at 1346-1347.

stripe diverge markedly from private interests,[40] and raise serious doubt whether the agency could ever be deemed to represent members of the public. Indeed, congressional appreciation of that divergence underlies the Act. The institutional predilections that distinguish the agency's position from the citizens argue against permitting the Commission to do via litigation what it may not do by agreement [41]—to bar applicants from information to which the Act mandates access. Far less do they justify departure from the rule, articulated in the milieu of antitrust enforcement, that "just as the Government is not bound by . . . litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation." [42]

40. As an institutional matter, the agency's policy goals will best be served if it is completely free to expend or conserve the power of its knowledge. See, *e.g.,* Rourke, *supra* note 17, 24 U. Chi. L. Rev. 231-233. One commentator has noted that "[i]t may be bad for appearances in a period of 'openness' and 'honesty' for an agency to refuse disclosure. . . ." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Law., 1125, 1134 (1975); accord, Note, *Protection from Government Disclosure—The Reverse FOIA Suit,* 1976 Duke L. J. 330, 359 (1976), *cf.* Comment, *supra* note 24, 70 Nw. U. L. Rev. at 998-999. On the other hand, self-interest may often move the agency to keep secret information that, if revealed, would embarrass it or frustrate its regulatory objectives. See S. Rep. No. 813, *supra* note 15, at 3; H. R. Rep. No. 1497, *supra* note 15, at 5-6.

41. *Petkas v. Staats,* 163 U. S. App. D. C. 327, 329, 501 F. 2d 887, 889 (1974).

42. *Sam Fox Publishing Co. v. United States,* 366 U. S. 683, 690, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604, 610 (1961); see *Battle v. Liberty Nat'l Life Ins. Co.,* 493 F. 2d 39, 52 (5th Cir. 1974), *cert. denied,* 419 U. S. 110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975); *Robertson v. Department of Defense, supra* note 35, 402 F. Supp. at 1346-1347; *cf. City of Chicago v. General Motors Corp.,* 332 F. Supp. 285 (W. D. Ill. 1971), *aff'd,* 467 F. 2d 1262 (1972). But *cf. Proctor & Gamble Co. v. Byers Transp. Co., Inc.,* 355 F. Supp. 547, 558 n. 18 (W. D. Mo. 1973).

We have no quarrel with the proposition that in appropriate circumstances the Government may represent private parties in a judicial proceeding and that that suffices to bar those represented

Nor can the agency's role in reverse-FOIA litigation be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. At the outset, the clash of purposes would render the bureaucracy suspect as a representative of any class composed of FOIA requesters.[43] Even passing that, when—as in the present circumstances—no class has been convened, no preclusive effect can possibly follow, and the public's right to know remains secure.

C. *Comity.*

That brings us lastly to comity, here reflected in the principle that "[o]rdinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed

42. (Cont'd.)
from collaterally attacking the resulting judgment. See *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F. 2d 84, 91-101 (5th Cir.), *cert. denied*, 434 U. S. 832, 98 S. Ct. 117, 54 L. Ed. 2d 93 (1977); Restatement (Second), of Judgments, § 85, comment *d* at 61-62 (Tent. Draft No. 2, 1975). But to accept a governmental agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent: The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information. See also note 40 *supra*.

43. To view the Commission as litigant of the requesters' rights in their stead "is to attribute to [it] a power that it cannot be said that [it] has assumed to exercise, and a responsibility which, in view of [its] interests[,] it does not appear that [it] could rightly discharge." *Hansberry v. Lee*, *supra* note 38, 311 U. S. at 46, 61 S. Ct. at 120, 85 L. Ed. at 29. "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45, 61 S. Ct. at 119-120, 85 L. Ed. at 29.

with it without interference from other courts under suits subsequently instituted."[44] Though we have not the smallest quarrel with that time-honored dogma, it should not be permitted to hold sway outside situations in which it was designed to apply. Created to assure judicial efficiency and to reflect abiding respect for other courts,[45] the doctrine surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent.

In fact, though perhaps subconsciously at times, the courts have not allowed comity to be debased in such a fashion. The decisions invoking the principle involve circumstances in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter.[46] When everyone with an interest

44. *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, 140 F. 2d 47, 49 (4th Cir. 1944).

45. See *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483, 498 (1976); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 409, 525 F. 2d 620, 626 (1975).

46. *E.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U. S. 180, 181, 72 S. Ct. 219, 220, 96 L. Ed. 200, 202 (1952) (parties to subsequent suit were both involved in first action); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 411, 525 F. 2d 620, 628 (1975) (all parties to subsequent suit were involved in first action); *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951, 84 S. Ct. 968, 11 L. Ed 2d 971 (1964) (same plaintiff in both suits; substantially the same parties altogether); *Food Fair Stores, Inc. v. Square Deal Market Co.*, 88 U. S. App. D. C. 176, 177, 187 F. 2d 219, 220 (1951) (same parties and issues); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197, 1202-1203 (2d Cir. 1970) (same parties and issues); *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F. 2d 1012, 1014 (2d Cir. 1944) (second suit by defendant in prior proceeding against plaintiffs in that first action must be enjoined, but suit on same issue and subject matter against corporation that was not party to first suit must be allowed to continue); *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, *supra* note 44, 140 F. 2d at 49 (same parties in both suits); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F. 2d 403, 405 (5th Cir. 1971) (de-

could have had his claim resolved in one court, it would be senseless to allow some of the parties to initiate concurrent litigation over the same dispute. But that is not this case. Some—at least appellants—with a stake in the controversy were not before the Delaware court, and accordingly the principle of comity is inapplicable.[47] Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by the Act[48] and the Constitution,[49] to have their claims adjudicated.

III. Accommodating FOIA and Reverse-FOIA Suits.

The sum of the foregoing is that none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency. One obvious consequence is that federal agencies that are prey to reverse-FOIA suits may

46. (Cont'd.)
fendants in first suit brought subsequent action); *Martin v. Graybar Elec. Co.*, 266 F. 2d 202, 204 (7th Cir. 1959) (both suits involved the same parties and issues); *American Chem. Paint Co. v. Thompson Chem. Corp.*, 244 F. 2d 64, 65-66 (9th Cir. 1957) (same plaintiffs in all suits); *O'Hare Internat'l Bank v. Lambert*, 459 F. 2d 328, 330 (10th Cir. 1972) (identical actions brought by same party). See also, *e.g.*, *Will v. Calvert Fire Ins. Co.*, — U. S. —, —, 98 S. Ct. 2552, 2555, 57 L. Ed. 2d 504, 508 (1978) (same parties and issue in state and federal court suits); *Colorado River Water Conservation Dist. v. United States*, *supra* note 45, 424 U. S. at 806, 96 S. Ct. at 1240-1241, 47 L. Ed. 2d at 491 (same); *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 494-495, 62 S. Ct. 1173, 1175-1176, 86 L. Ed. 1620, 1625 (1942) (same); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 263, 31 S. Ct. 11, 13-14, 54 L. Ed. 1032, 1038-1039 (1910) (plaintiff in subsequent state suit was a corporation utilized merely as a device by defendant in first federal suit).

47. *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346, citing *Great N. Ry. Co. v. National R. R. Adjustment Bd.*, 422 F. 2d 1187, 1193 (7th Cir. 1970).

48. See 5 U. S. C. § 552(a)(4)(B) (1976).

49. See text *infra* at notes 60-61.

by that token find themselves subject to the possibility of inconsistent judgments. Threats of that nature are not unprecedented, however, and there are procedural devices aplenty designed to avoid the hazard of conflicting obligations.[50] Resort to them in the present context, moreover, would have brought about representation of all interests before the court that first addressed the merits, and thereby would have eliminated the problem completely.

Another consequence is that reverse-FOIA plaintiffs may find that, to prevent judgments in their favor from becoming nugatory, they must join in their lawsuits anyone whose request for information quickened the submitter's controversy with the agency[51]—or perhaps even, by way of a defendant class action, all those who likely may subsequently make such requests. That, too, can only be salutary, for it will assure that the public's interest will be represented by at least one of its own. It will also relieve courts of the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy.[52]

The manufacturer-plaintiffs could have named appellant-requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters.[53]

50. See, *e.g.*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 155 (D. D. C. 1976) (transfer and consolidation of FOIA and reverse-FOIA suits); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D. D. C. 1973) (reverse-FOIA advocate permitted to intervene as of right in FOIA suit). See also text *infra* at notes 53-56.

51. Joining the requester may constrain the reverse-FOIA plaintiff's choice of venue. See 28 U. S. C. A. § 1391(e) (1977 Supp.). See also 5 U. S. C. § 552(a)(4)(B) (1976), discussed in notes 66 and 71 *infra*.

52. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

53. See *United States v. Trucking Employers, Inc.*, 75 F. R. D. 682, 686-687 (D. D. C. 1977); Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative

They did not. The Commission, with some creativity, could have filed an interpleader counterclaim and joined the requesters on the theory that otherwise the Commission might be exposed to multiple accountability and that, in a dispute over disclosure, information is an indivisible res over which the parties contest.[54] It did not. At the very least, the Commission could have urged that the requesters were parties whose joinder was required under Civil Rule 19.[55] But no consideration was given to the mandates of that rule,[56] though, as we now elucidate, its applicability could hardly have been questioned.

If, as the manufacturers and the Commission assert, the Delaware reverse-FOIA suit so affected appellants' interest in disclosure of the information sought that they are now barred from litigating it in the District Court here, the Delaware action certainly could have been said, in the words of Rule 19, "as a practical matter [to] impede [their] ability to protect that interest or . . . [to] leave [the agency] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [appellants'] claimed interest." [57]

53. (Cont'd.)
parties on behalf of all" if certain prerequisites are met). See generally Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459 (1977); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

54. See Fed. R. Civ. P. 22; Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966); *cf. Gauss v. Kirk*, 91 U. S. App. D. C. 80, 83, 198 F. 2d 83, 86 (1952).

55. Fed. R. Civ. P. 19.

56. Indeed, though any court may—and should, if justified—examine the issue of Rule 19 *sua sponte*, the Commission refused to consent to the filing of the requesters' amicus brief raising the question on the appeal to the Third Circuit of the Delaware court's ruling. See note 12 *supra*. The Third Circuit granted leave to file the brief, however.

57. Fed. R. Civ. P. 19(a). The possible difficulty that reverse-FOIA plaintiffs might not know the identities of all present or future requesters can be ameliorated by joining any known requesters as representatives of a defendant class. See note 53 *supra*.

Indeed, the concept of joinder was created to resolve the problem of conflicting exercise of equity jurisdiction.[58] Rule 19(b) states the considerations that must guide a determination whether one described by Rule 19(a) must be regarded as so indispensable that the litigation must be dismissed. Those factors include

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In our view, those factors, had anyone in the Delaware action paused to look at them, surely demanded dismissal of the manufacturers' Delaware suit, or at least an injunction shaped to impact to the smallest possible extent upon the absent requesters' interest.

Joinder of the requesters would have been the better course, for it would have avoided the duplicative litigation in which we now are unfortunately entangled, but it was not the only solution. A well-crafted judgment in Delaware could have steered clear of any embarrassment to appellants' claim. Indeed, the inherent tension between

58. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102, 120, 88 S. Ct. 733, 743-744, 19 L. Ed. 2d 936, 950-951 (1968). Rule 19 also helps "to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits." *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499, 516 (1902).

reverse-FOIA and FOIA suits could often be mitigated by a rule that, unless the party resisting disclosure joins in his reverse-FOIA suit those seeking release, any injunction therein must be drafted to halt only voluntary disclosure by the agency, and to leave unaffected the requesters' right to seek a subsequent judicial determination that the Act mandates disclosure.[59]

IV. Conclusion.

Appellant requesters were not made parties to the Delaware action, and the effect of that omission on this litigation is, to us, indisputable. A judgment cannot bind those who were not before the court either in person or through some sort of representative.[60] As the Supreme Court has declared, in dealing with situations where "a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties . . . , no Court can adjudicate directly upon a person's right, without the party being

59. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 112 n. 10, 88 S. Ct. at 739, n. 10, 19 L. Ed. 2d at 946 n. 10 (the pertinent questions are "[c]an the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery"). We need not reach the question whether by similar reasoning requesters must always join submitters as defendants in their FOIA suits, for appellants here have done so in their complaint.

60. *Hansberry v. Lee, supra* note 38, 311 U. S. at 40-41, 45, 61 S. Ct. at 117-118, 119-120, 85 L. Ed. at 26-27, 29; see *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered"); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., supra* note 46, 342 U. S. at 186, 72 S. Ct. at 222, 96 L. Ed. at 204 ("[i]f the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere").

either actually or constructively before the Court."[61] This basic tenet of due process can hardly be circumvented through the ritualistic invocation of "comity." The manufacturers have no valid objection to relitigation of disclosure of this information, "for clearly the plaintiff [in the earlier suit], who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtain[ed] against them."[62] Nor can the Commission legitimately bemoan the threat of inconsistent obligations since it never attempted to foreclose that possibility by seeking the joinder of appellants in Delaware.[63]

61. *Mallow v. Hinde,* 25 U. S. (12 Wheat.) 193, 198, 6 L. Ed. 599, 600 (1827), quoted with approval in *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 122, 88 S. Ct. at 744, 19 L. Ed. 2d at 952. See also *Western Union Tel. Co. v. Pennsylvania,* 368 U. S. 71, 74-75, 82 S. Ct. 199, 201, 7 L. Ed. 2d 139, 142-143 (1961) (forced relinquishment of property interest without assurance that holder will not be held liable again to another in another court violates due process, "and, of course, New York's claims could not be cut off where New York was not heard as a party").

62. *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 111, 88 S. Ct. at 739, 19 L. Ed. 2d at 946; see *Boles v. Greenville Housing Auth.,* 468 F. 2d 476, 479 (6th Cir. 1972) ("[a]ny hardship suffered . . . is attributable to their own failure to bring [an interested person] into the case as a party"). It is no answer to say that a plaintiff normally is allowed to choose how to write his complaint:

> The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

Schutten v. Shell Oil Co., 421 F. 2d 869, 873 (5th Cir. 1970).

63. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[a]fter trial, however, if the defendant has failed to assert

The only factor even remotely capable of preventing appellants from prosecuting their FOIA suit toward a result contrary to the broad Delaware reverse-FOIA injunction is their failure to intervene in the proceeding there.[64] We believe, however, that appellants, and perhaps information-requesters generally, should not suffer from bypasses of this sort. To decide otherwise would force them to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester.[65] Congress specified the sites

63. (Cont'd.)
this interest [against inconsistent relief], it is quite proper to consider it foreclosed"). Had the Commission raised the issue in a timely fashion, the Delaware court expectably would either have ordered joinder, modified the relief ultimately granted or dismissed the action. The Supreme Court has instructed that if "[a]mong the unpleasant possibilities entailed by proceeding [is] the likelihood that the defendant might find itself subject to directly conflicting injunctive orders . . . 'the court must refuse to exercise jurisdiction . . . or become the instrument of injustice.'" *Id.* at 123, 88 S. Ct. at 745, 19 L. Ed. 2d at 952, quoting *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 56 U. S. (15 How.) 233, 246, 14 L. Ed. 674, 681 (1854).

64. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, *supra* note 58, 390 U. S. at 114, 88 S. Ct. at 740, 19 L. Ed. 2d at 947-948 (reversing this question). Compare *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 Harv. L. Rev. 874, 882-883 (1958) with *id.* at 884-885. Preclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation.

65. For example, in *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, one requesting party was the Legal Aid Society of Alameda County, California, but the reverse-FOIA suit was litigated in Virginia, where the requester felt it necessary to intervene. The inconvenience of cross-country intervention is magnified by the familiar rule that "an intervenor generally is held to have waived his privilege to change the venue of a suit." *Commonwealth Edison Co. v. Train*, 71 F. R. D. 391, 394 (N. D. Ill. 1976), citing *TWA v. CAB*, 339 F. 2d 56, 64 (2d Cir. 1964), *cert. denied*, 382 U. S. 842, 86 S. Ct. 40, 15 L. Ed. 2d 82 (1965) and 3B, Moore's Federal Practice § 24.19 (2d ed. 1975).

proper for judicial consideration of FOIA claims;[66] to allow submitters to force FOIA litigation[67] to occur in other arenas would free the tail to wag the dog.[68]

This, in our opinion, is the type of "undue hardship" expressly discountenanced by the Advisory Committee when it discussed amended Rule 19 in 1966.[69] The rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible.[70] A generally applicable theory of waiver by one who declines to voluntarily step into the proceeding would abrogate the rule and its purpose completely. It is the party's —not the nonparty's—responsibility to make certain that the court has before it all those needed to enable it to serve the ends of justice. And if the essential nonparty cannot, for reasons of personal jurisdiction, be joined in the suit, then the litigation must proceed elsewhere, if at all.[71]

This case, therefore, must finally continue toward a decision on the merits in the District Court for the District

66. The Freedom of Information Act specifies "the district court of the United States in the district in which the complainant [requester] resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia" as the courts in which enforcement of the Act can properly be sought. 5 U. S. C. § 552(a)(4)(B) (1976).

67. As noted earlier, notes 29-30 *supra* and accompanying text, a court analyzing the merits of reverse-FOIA litigation must surely determine the applicability of the disclosure demands of the Act.

68. *Cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U. S. 523, 535, 87 S. Ct. 1199, 1206, 18 L. Ed 2d 270, 278 (1967).

69. Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966).

70. See *Ricci v. State Bd. of Law Examiners*, 569 F. 2d 782, 784 (3d Cir. 1978); Fed. R. Civ. P. 19(a).

71. Congress specified that the applicability of the Freedom of Information Act be litigated in the requester's district or in other designated areas, but made no provision at all for venue in the submitter's "home court." See note 66 *supra*.

of Columbia. Its first task is to analyze closely the Delaware court's reasoning, for it may turn out that the court here will agree with the Delaware court. Should, however, the court decide that the failure to release the information was indeed improper, it will have to ascertain the relief appropriate in the circumstances. Since the manufacturers are party-defendants, it might consider enjoining them from enforcing their Delaware judgment against the Commission.[72] In short, our decision is a narrow one—that this litigation is not prohibited by the earlier action—and we have not attempted to decide whether or not actual disclosure should be the final result.

Remanded.

72. Compare *Steelman v. All Continent Corp.*, 301 U. S. 278, 291, 57 S. Ct. 705, 710-711, 81 L. Ed. 1085, 1093 (1937) with *Lapin v. Shulton, Inc.*, 333 F. 2d 169, 172 (9th Cir.), *cert. denied*, 379 U. S. 904, 85 S. Ct. 193, 13 L. Ed. 2d 77 (1964).

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
Plaintiffs,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,
GTE SYLVANIA, INC.,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION
OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA OF AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.

1. This is an action under the Freedom of Information Act, as amended, 5 U. S. C. § 552 ("the Act"), by consumer organizations seeking an opportunity to inspect and/or copy documents in the possession of the Consumer Product Safety Commission concerning television-related accidents.

2. This Court has jurisdiction over the subject matter of this Complaint pursuant to 5 U. S. C. § 552(a)(3); 5 U. S. C. § 702; and 28 U. S. C. § 2201-02. Venue is properly laid in this district pursuant to the Act, 5 U. S. C. § 552(a)(3).

3. Plaintiff Consumers Union of United States, Inc. ("Consumers Union"), with several hundred thousand members, many of whom are owners or prospective owners of televisions which are or may be hazardous, is the largest consumer organization in the United States. It was organized in 1936 as a nonprofit organization under the laws of the State of New York to provide information, education and counsel on consumer goods and services. Consumers Union publishes *Consumer Reports*, a monthly magazine of consumer information with a paid circulation of more than 2 million readers. Consumers Union tests and rates consumer products, including televisions, and gathers other information relating to the performance, including safety performance, of these products. *Consumer Reports* regularly carries, and plans to carry in the future, articles reflecting such testing and rating of televisions.

Plaintiff Public Citizen is a nonprofit organization supported by voluntary donations from individuals, many of whom are owners or potential owners of television sets which are or may be hazardous. Public Citizen funds

the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

4. Defendant Consumer Product Safety Commission ("the Commission") is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U. S. C. § 2051 *et seq.*

Defendant Richard O. Simpson is Chairman of the Commission.

Defendants Barbara Franklin, Lawrence Kushner, Constance Newman, and R. David Pittle are Commissioners of the Commission.

Defendant Sadye Dunn is the Secretary of the Commission and the official designated by the Interim Freedom of Information Guidelines of the Commission to bear ultimate responsibility for responding to requests for records. (39 Fed. Reg. 30299, August 21, 1974).

Defendants GTE Sylvania, Inc., RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Motorola, Inc., Warwick Electronics, Inc., Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Sharp Electronics Corporation, Toshiba of America, Inc., General Electric Company, and Admiral Corporation are each corporations which manufacture television equipment and do business in the District of Columbia. Said defendants are hereinafter referred to collectively as "defendant corporations."

5. By separate letters dated June 14, 1974, plaintiffs each requested from defendant Commission under authority of the Act, an opportunity to inspect and/or copy documents relating to the safety of television sets, which documents were submitted by defendant corporations to the Commission in response to the Commission's Special Orders ("Special Orders") dated May 13, 1974.

In oral conversations, plaintiffs, defendant Dunn and other representatives of the defendant Commission agreed to extend the request to documents submitted by defendant corporations in response to Commission subpoenas directed to the defendant corporations and dated July 26, 1974.

6. Subsequently, plaintiffs limited their request to include only (a) the aforesaid submitted documents concerning television-related accidents and (b) documents resulting from Commission processing of such submitted documents, but excluding (1) legal correspondence which is within the attorney-client relationship or the attorney work product doctrine, and (2) the names and addresses of accident victims. Documents embraced within this limited request are hereinafter referred to as "the requested documents."

7. On November 5, 1974, following various efforts by plaintiffs to obtain Commission action on their requests, plaintiffs, defendant Dunn and other employees of the Commission met to discuss the status of plaintiffs' request, at which meeting plaintiffs protested defendant Commission's refusal, based upon blanket claims of confidentiality asserted by the defendant corporations, to disclose the requested documents. Commission representatives responded that a legal determination as to the availability of the requested documents for which claims of confidentiality had been advanced would be completed by mid-March 1975. By letter dated November 18, 1974, plaintiffs acquiesced to this timetable, but expressly reserved the right to consider additional delay as constituting a denial of their request.

8. On March 28, 1975, defendant Commission determined, *inter alia,* that the requested documents do not constitute exempt information under the Act, 5 U. S. C. § 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety.

9. By letter dated April 8, 1975, defendant Commission notified defendant corporations of the Commission's decision to release the requested documents. By telegram of April 17, 1975 (and correction of April 21, 1975), the Commission notified defendant corporations that no requested documents would be released until May 1, 1975.

10. By filing separate actions on or after April 22, 1975, in the United States District Court for the District of Delaware, defendants GTE Sylvania, Inc. (Civil Action 75-104), RCA Corporation (Civil Action 75-108), The Magnavox Company (Civil Action 75-112), Zenith Radio Corporation (Civil Action 75-113), Motorola, Inc. (Civil Action 75-114), Warwick Electronics, Inc. (Civil Action 75-115), and Aeronutronic Ford Corporation (Civil Action 75-116) have sought injunctions against disclosure, *Inter alia,* of the requested documents.

By filing separate actions on or after April 22, 1975, in the United States District Court for the Southern District of New York, defendants Matsushita Electric Corporation of America (Civil Action 75-2040), Sharp Electronic Corporation (Civil Action 75-2049), and Toshiba of America, Inc. (Civil Action 75-2050) have sought injunctions against disclosures, *inter alia,* of the requested documents.

Defendant General Electric Company filed suit (Civil Action 75-CV-189) in the United States District Court for the Northern District of New York seeking an injunction against disclosure, *inter alia,* of the requested documents.

Defendant Admiral Corporation (Civil Action 75-531) filed suit in the United States District Court for the Western District of Pennsylvania seeking an injunction against disclosure, *inter alia,* of the requested documents.

11. Defendant corporations applied for temporary restraining orders prohibiting disclosure of the requested documents in each of the actions described in paragraph 10 hereof. In each case, the Commission has consented to said applications and as a result, temporary restraining orders have been entered in each case for periods of up to 60 days, and disclosure of the requested documents to plaintiffs has thereby been prevented.

12. By letter dated April 28, 1975, plaintiff Consumers Union notified defendant Commission and defendant Dunn that the Commission's action in consenting to such a temporary restraining order would be deemed a denial of plaintiffs' rights to the requested documents and that plaintiffs would seek their remedy in court.

13. The requested documents are subject to mandatory disclosure under the Act, and the continued and prolonged withholding of such documents by defendant Commission, including its consent to applications by defendant corporations for said temporary restraining orders violates the Act. Plaintiffs have been and are irreparably harmed thereby and lack an adequate remedy at law.

WHEREFORE, plaintiffs pray:

(1) that this Court declare that the requested documents must be made immediately available to plaintiffs for inspection and/or copying;

(2) that this Court permanently enjoin defendant Commission and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying of the requested documents;

(3) that this Court expedite these proceedings;

(4) that this Court award plaintiffs their costs and disbursements in this action, including reasonable counsel fees; and

(5) that this Court grant such other relief as the Court may deem just and proper.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 11, 1975

Opinion.

RICHEY, *District Judge.*

Plaintiffs Consumers Union of United States, Inc., and Public Citizens' Health Research Group filed this action on May 5, 1975, seeking access under the Freedom of Information Act, 5 U. S. C. § 552, to certain reports on television accidents submitted to the Consumer Product Safety Commission (CPSC) by various television manufacturers. The defendants in this case are the CPSC, its Chairman, Commissioners, and Secretary; and twelve television manufacturers which submitted the reports in question. The plaintiffs seek relief in the following form: (a) a declaration that the requested documents, currently in possession of the CPSC, must be made immediately available to the plaintiffs for inspection and/or copying; and (b) an injunction enjoining the CPSC and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying.

The case is currently before the Court on the motions of ten television manufacturers to dismiss or, in the alternative, to stay these proceedings.[1] The defendants claim that with respect to the Government, the complaint fails to present a "case or controversy" within the meaning of Article III, section 2 of the United States Constitution,[2] and that with respect to the manufacturers the complaint fails to state a claim upon which relief can be granted. The defendant-manufacturers also claim that because a similar action involving virtually the same issues is pending in the United States District Court for the District of Delaware, this action should be dismissed in the interests of comity and judicial economy.

I. Background.

A somewhat complex course of events provides the background for this action. In May, 1974, the CPSC issued special orders to television manufacturers requesting that they submit, *inter alia,* all accident reports collected by the manufacturers since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate which, if any, of the reports they submitted were, in the manufacturers' view, entitled to exemption from disclosure under the Freedom of Information Act (FOIA). In June, 1974, plaintiffs herein requested access, under the FOIA, to the documents submitted by the manufacturers in response to the CPSC's orders of the previous month. While the

1. Defendants Admiral, Aeronutronic Ford, General Electric, GTE Sylvania, Magnavox, RCA, Sharp, Toshiba, Warwick, and Zenith have so moved. The remaining defendants, Motorola, Matsushita, and the CPSC, have in effect so moved by praying for dismissal in their answers to the plaintiffs' complaint.

2. The federal defendant has also, in effect, so moved. See note 1, *supra,* and Answer of the Consumer Product Safety Commission at "First Defense".

plaintiffs were given access to those reports for which confidentiality was not claimed by the manufacturers, the plaintiffs were not immediately afforded access to the documents which the manufacturers claimed were exempt from the FOIA. Instead, the CPSC, in August, 1974, informed the manufacturers of the plaintiffs' FOIA request and directed the manufacturers to substantiate their claims of confidentiality. In the meantime, the CPSC had determined, in July, 1974, that the manufacturers' response to its first request for documents was not complete; the CPSC ordered the manufacturers to make further submissions and extended the plaintiffs' FOIA request to the additional data submitted by the manufacturers. Plaintiffs subsequently limited their request to exclude documents protected by the attorney-client privilege or the work-product doctrine and those portions of documents which contained the names and addresses of accident victims.

With their request still unanswered, plaintiffs informed the CPSC in October, 1974, that any further delay would be considered by the plaintiffs as a denial of their request under the FOIA. As a result of that communication, representatives of the plaintiffs and the CPSC met in November, 1974, and agreed upon a timetable for the completion of CPSC's review of the voluminous submissions. It was estimated that the CPSC's legal determination as to the availability of the requested documents would be completed by mid-March of 1975. Plaintiffs acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.

On March 28, 1975, the CPSC issued its legal determination that the documents requested by the plaintiffs did not fall within the exemptions of the FOIA and that, even if the data were exempt, disclosure by the CPSC was

nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety. The CPSC subsequently notified the television manufacturers of its decision to release the requested documents and of its intention to withhold disclosure until May 1, 1975. Upon said notice, seven of the defendant television manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware,[3] each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq*. Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[4] the United States District Court for the Northern District of New York,[5] and the United States District Court for the Western District of Pennsylvania.[6] In all of the actions, the manufacturers applied for temporary restraining orders prohibiting the release of the documents pending determination of their motions for preliminary injunction. The CPSC consented to the temporary restraining order in at least some of the cases.[7]

3. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith, (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116).

4. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049), and Toshiba (C. A. No. 75-2050), filed actions in the Southern District of New York.

5. General Electric (75-CV-189) filed suit in the Northern District of New York.

6. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

7. The plaintiffs claim that the agency consented to the orders in all of the cases filed by the manufacturers. Plaintiffs' complaint at ¶ 11. The CPSC claims that it consented to some but not all of

The instant action was filed on May 5, 1975. Subsequently, the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[8] Oral arguments on the preliminary injunction motion in the consolidated cases were heard by Chief Judge Latchum in July, 1975. The documents in question in both this action and the consolidated cases in Delaware remain in the possession of the CPSC and subject to the above-mentioned restraining orders pending Judge Latchum's decision on the motion for preliminary injunction.[9]

II. No Case or Controversy Exists Between Plaintiffs and the CPSC.

Plaintiffs invoke the jurisdictional sections of the FOIA, 5 U. S. C. § 552(a)(3), and the Administrative Procedure Act, 5 U. S. C. § 702, as bases for this Court's jurisdiction in this case.[10] Both statutes pertain to actions against federal agencies. In this case, plaintiffs seek an order instructing the agency to provide plaintiffs access to the documents in question for inspection and/or copying. At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under

7. (Cont'd.)
the orders. Answer of the Consumer Product Safety Commission at ¶ 11. For purposes of this motion to dismiss, plaintiffs' allegations are taken as true.

8. *In re: Consumer Product Safety Commission Litigation*, Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152 (D. Del.).

9. The statement of facts above is drawn from all of the substantive pleadings in this case.

10. Plaintiffs also invoke the Declaratory Judgment Act, 28 U. S. C. § 2201-02, as a ground for this Court's jurisdiction, plaintiffs' complaint at ¶ 2. The Declaratory Judgment Act is not, however, a statute which confers jurisdiction. See, *e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950).

the FOIA.[11] The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding of March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case.

The Constitution extends federal courts' jurisdiction only to specified cases and controversies.[12] Implicit in the "case and controversy" doctrine is the requirement that litigation must arise "between adverse litigants." *Muskrat v. United States*, 219 U. S. 346, 361 (1911); *Aetna Life Insurance Co. v. Hawarth*, 300 U. S. 227 (1937). Where opposing litigants desire "the same result," as here, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971); *General Electric Co. v. Bootz Mfg. Co.*, 289 F. Supp. 504 (D. Ind. 1968). This Court is faced with the prospect in the instant action that both the plaintiffs and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA. In such a posture, this case does not present a question "in an adversary context," as required by the Constitution. *Flast v. Cohen*, 392 U. S. 83, 95 (1968).

Plaintiffs contend, however, that the "controversy" which they present as between themselves and the agency centers on the agency's failure to contest the temporary restraining orders issued in the now-consolidated cases brought by the manufacturers. According to the plaintiffs, the agency's failure to contest the orders constituted a violation of the agency's duty under the FOIA to speedily deliver the documents in question once a determination

11. See plaintiffs' complaint at ¶ 13.

12. U. S. Const., art. III, § 2. See *Golden v. Zwickler*, 394 U. S. 103 (1969); *Baker v. Carr*, 369 U. S. 186 (1969).

was made that such documents were subject to disclosure. Plaintiffs also allege that the agency's failure to contest the orders reflects a certain lack of good faith toward the plaintiffs.

As an initial matter, this Court notes, admittedly without having all of the facts before it,[13] that it does seem curious that the agency, having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining orders. However, regardless of any possible impropriety on the agency's part, its failure to contest the motions does not present a "controversy" between plaintiffs and the CPSC in this case. Plaintiffs do not ask for a mere declaration that the agency "shouldn't have" consented to the orders—it is doubtful, in fact, that such a "wrong" would be actionable. Plaintiffs ask instead that the agency be ordered to release the documents to the plaintiff, and a decision to that effect made by this Court would necessarily entail a determination that the documents are subject to disclosure under the FOIA. As discussed above, there is no adversity between the agency and the plaintiffs, and thus no case or controversy, with respect to the FOIA issue.

Plaintiffs point to the case of *Robertson v. Department of Defense*, Civil No. 74-644 (D. D. C., June 19, 1975), in support of their claim that a controversy exists in the instant action. *Robertson* involved a very similar fact situation to this case. The General Motors Corporation had submitted certain documents to the Department of Defense which Robertson subsequently requested, for purposes of inspection, under the FOIA. The Department determined that some *but not all* of the documents were

13. See note 7, *supra*.

subject to FOIA disclosure. General Motors thereupon sued the Department and other federal defendants in the United States District Court for the Eastern District of Virginia, seeking an injunction against the disclosure of the documents. Robertson countered by filing an FOIA suit against the Department and General Motors in this Court. In allowing the plaintiff to maintain suit, Judge Barrington D. Parker pointed out what is, for purposes of the instant case, the crucial characteristic of *Robertson*: "[I]n the Virginia proceeding and in the matter before this Court, the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act." Memorandum Opinion of June 19, 1975, at 8. In *Robertson*, unlike the instant action, there were areas of disagreement between the plaintiff and the governmental defendant.[14]

In essence, what the plaintiffs ask this Court to do in the instant case is to re-determine whether the restraining orders obtained by the manufacturers in various federal district courts should have issued. It is true that the CPSC consented to the various orders. Nonetheless, it was the responsibility of each court—and this Court cannot but assume that said responsibility was met—to make an independent determination that an order was justified. See, *e.g.*, Judge Latchum's Temporary Restraining Order of April 23, 1975, in *RCA Corp. v. United States Consumer Product Safety Commission*, Civil No. 75-108 (D. Del. filed April 22, 1975). As the United States Court of Ap-

14. Plaintiffs also question the genuineness of the agency's conclusion on the FOIA issue: "[E]ven if the Commission should prevail in the Delaware action, it could then decide as a discretionary matter to refuse to disclose the data to plaintiffs." Plaintiffs' Motion for Summary Judgment at 43 n. * *. But the agency has assured the Court on the public record that "disclosure will be made as soon as the federal defendants are not enjoined from doing so." CPSC's Answer at ¶ 13.

peals for the District of Columbia Circuit has noted, "in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own." *Hilton Hotels Corp. v. Weaver,* 325 F. 2d 1010 (1963), *cert. denied,* 376 U. S. 951 (1964) (footnote omitted).

III. Plaintiffs' Complaint Fails to State a Claim Against the Defendant-Manufacturers Upon Which Relief Can Be Granted.

As noted above, this case is brought under the FOIA and the Administrative Procedure Act. Those statutes entitle a claimant to relief against federal agencies and, accordingly, plaintiffs' complaint is styled to request relief from inaction by the CPSC. Plaintiffs have also named twelve television manufacturers as defendants in this case, but no relief is requested from the manufacturers. Indeed, the manufacturers are in no position to provide relief inasmuch as the documents in question are in the possession of the agency. Thus, as to the defendant-manufacturers, plaintiffs "can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957). The defendant-manufacturers would thus seem to be entitled to dismissal under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' failure to state a claim upon which relief can be granted.

Plaintiffs maintain, however, that because the defendant-manufacturers have such a strong interest in the outcome of this litigation, they are subject to suit under the compulsory joinder provision of Fed. R. Civ. P. 19(a). Assuming *arguendo* that Rule 19(a) could be so employed in the current litigation, the plaintiffs would nonetheless be faced with an uncleared hurdle: lack of jurisdiction.

As noted in the preceding section, there is no case or controversy between plaintiffs and the federal defendant. Lack of a case or controversy is a jurisdictional defect. See *Aetna Life, supra; Tilley Lamp Co. v. Thacker,* 454 F. 2d 805, 808 (5th Cir. 1972). Plaintiffs have suggested that "even assuming *arguendo* that no live case or controversy existed between plaintiffs and the Commission, nothing is clearer than that a very live case or controversy exists between plaintiffs and the manufacturers." Plaintiffs' Motion for Summary Judgment at 35. Plaintiffs would thus provide the missing jurisdictional ingredient of case or controversy by joining, under Rule 19(a), the defendant-manufacturers who certainly possess an interest adverse to plaintiffs' in this litigation. The plaintiffs' solution is ingenious but unfortunately not authorized by Rule 19, which is "predicated upon the preexistence of federal jurisdiction over the cause of action . . ." *Letmate v. Baltimore and Ohio R. R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970). Rule 19 canot be used "in a way that would extend the subject matter jurisdiction of the Federal courts; indeed, Rule 82 precludes any construction of the Rule that would have such an effect." 7 Wright and Miller, *Federal Practice and Procedure* § 1602, at 20 (footnote omitted); see also *Anderson v. United States,* 217 F. Supp. 814 (E. D. Pa. 1963).

IV. Conclusion.

Plaintiffs' complaint must therefore be dismissed for failure to present a case or controversy as to the federal defendant and failure to state a claim upon which relief can be granted as to the defendant-manufacturers.[15] In

15. Defendant-manufacturer Warwick has moved for dismissal on the additional grounds that this Court lacks personal jurisdiction over Warwick. In view of the Court's disposition of this case, it is unnecessary to consider Warwick's motion.

reaching this conclusion, the Court notes that it is especially reluctant to bar the courthouse door when the plaintiff is, as in the instant case, a representative of the public interest. But the Constitution demands no less, considering the present posture of this case.

The Court is aware of the possibility that plaintiffs failed to intervene in the Delaware proceedings in the hope that this Court would assume jurisdiction in the present case. In declining to do so, this Court in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding.

An order in accordance with the foregoing Memorandum Opinion will be issued of even date herewith.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: September 11, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Order.

This case has come before the Court on the motions of various defendants to dismiss and the plaintiffs' opposition thereto. The Court has considered the extensive pleadings filed by the parties in this case, and for the reasons set forth in the memorandum opinion of the Court of even date herewith, concludes that the case should be dismissed because: (a) as to the federal defendant, plaintiffs do not present a case or controversy within the meaning of Article III, section 2 of the United States Constitution; and (2) as to the defendant-manufacturers, plaintiffs do not state a claim upon which relief can be granted.

Therefore, it is, by the Court, this 11th day of September, 1975,

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that this case be, and the same hereby is, dismissed.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Court

FIRST OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges*.

Argued September 21, 1976
Decided July 5, 1977

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: We consider here an appeal from a dismissal of an action brought by the appellants under the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1970 & Supp. V 1975). They seek to obtain, from the Consumer Product Safety Commission, reports which various television manufacturers have submitted on television-related accidents.

For the reasons stated below, we reverse the District Court's dismissal of the plaintiffs' action and remand the case for further proceedings.

I. THE PARTIES

Appellant Consumers Union is a nonprofit consumer organization. It provides information—through its monthly magazine *Consumer Reports* and through other means—on the merits, defects, dangers, and comparative efficacy of consumer goods, including television sets. Appellant Public Citizen, also a nonprofit organization, funds the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

Appellee Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to its enactment of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). The Commission's purpose is to help implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] Several of the officers of the Commission and 12 companies that manufacture television sets and do business in the District of Columbia were, together with the Commission, also named as defendants below and are also appellees before this court.

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1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U. S. C. § 2051(b) (Supp. V 1975).

II. Background

The background of the present impasse is extensive and, in some respects, complex. In March 1974 the Commission issued a public notice [2] announcing that it would hold a public hearing to investigate hazards encountered during operation of television receivers and to consider the necessity of developing safety standards for such receivers. In the notice the Commission requested certain technical information and data on television-related accidents from manufacturers of television sets and component parts. In particular the Commission requested that the manufacturers submit all accident reports collected since the National Commission on Product Safety held hearings on the subject in 1969.[3] Although a few manufacturers complied with the Commission's request, the principal response consisted of a six-page summary of accident data supplied by the Electronics Industry Association (EIA).

After reviewing the data voluntarily submitted, the Commission concluded that the "information submitted to the Commission by the EIA on behalf of the [companies did] not satisfy the Commission's request."[4] Accordingly, on May 13, 1974 the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1) (Supp. V 1975), sent special orders to 25 manufacturers seeking specified information.[5] In the cover letter accompanying the special orders the Commission noted the possibility of a request for public access to this information via the FOIA, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to substantiate any such claims. Claims of confidentiality accompanied the responses of most manufacturers. Again the Commission reviewed the submitted data and again the Commission found that certain of the manufacturers had not complied with the request. Thus on July 26, 1974 supoenas [sic] *duces tecum* were issued to the appellee manufacturers and three other manufacturers [6] requiring production of specified technical information and all television-related accident data.

Appellants' first request for access, under the FOIA, to data submitted by the manufacturers was in June 1974 and pertained to the documents submitted in response to the Commission's special orders of the previous month.[7] Although appellants were given access to those reports for which confidentiality was not claimed by the manufacturers, they were not allowed access to documents which the manufacturers claimed were exempt from the FOIA.[8] Instead, in August 1974 the Commission informed the manufacturers of appellants' FOIA request and again directed the manufacturers to substantiate their claims of confidentiality. The Commission also extended appellants' FOIA request to the additional data which the Commission later subpoenaed from the manufacturers.[9]

2. 39 Fed. Reg. 10929 (March 22, 1974).

3. *Id.*

4. *E.g.*, Special Order of the Commission to General Electric Company, Docket Item 11A, Ex. A-1, in Civil Action (CA) No. 75-136 (D. Del.).

5. Of the appellee manufacturers here, apparently only RCA did not receive a special order. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, 404 F. Supp. 352, 358 n. 11 (D. Del. 1975).

6. Sony Corporation, Sanyo Electric, Inc., and Wells-Gardner Electronics Corporation were subpoenaed but did not seek to bar public disclosure of data they forwarded to the Commission. Evidently the Commission did not order all manufacturers of television sets sold in this country to submit accident reports. *GTE Sylvania Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 359 n. 18.

7. *Consumers Union of United States v. Consumer Product Safety Com'n*, 400 F. Supp. 848, 850 (D. D. C. 1975).

8. *Id.*

9. *Id.*

Appellants subsequently limited their request to exclude documents protected by the attorney-client privilege or the work product doctrine and those portions of documents that contained names and addresses of accident victims. Even with this limitation, however, appellants' request went unfulfilled.[10] In October 1974, therefore, four months after their initial request, appellants informed the Commission that they would consider any further delay to be a denial. As a result of that communication, representatives of appellants and the Commission met in November 1974 and agreed upon a timetable for completion of the Commission's review of the manufacturers' submissions. It was estimated that the Commission's legal determination as to availability of the requested documents would be completed by mid-March of 1975. Appellants acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.[11]

On March 28, 1975—nine months after appellants' initial request—the Commission issued its legal determination that the documents requested by appellants did not fall within the exemptions of the FOIA. It also stated that, even if the data were exempt from mandatory disclosure, disclosure by the Commission was nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety.[12] The Commission subsequently notified the television manufacturers of its decision to release the requested documents on May 1, 1975. After receiving that notice, seven of the manufacturers filed separate actions against the Commission in the United States District Court for the District of Delaware,

10. *Id.*

11. *Id.*

12. *Id.*

each seeking an injunction prohibiting disclosure on the ground that release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975).[13] Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[14] the United States District Court for the Northern District of New York,[15] and the United States District Court for the Western District of Pennsylvania.[16] In all of the actions the manufacturers applied for temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunctions. The Commission consented to the temporary restraining orders in at least some of the cases.[17] Subsequently the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[18] Even though

13. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (CA No. 75-104), RCA (CA No. 75-108), Magnavox (CA No. 75-112), Zenith (CA No. 75-113), Motorola (CA No. 75-114), Warwick (CA No. 75-115), and Aeronutronic Ford (CA No. 75-116).

14. Matushita (CA No. 75-2040), Sharp (CA No. 75-2049), and Toshiba (CA No. 75-2050) filed actions in the Southern District of New York.

15. General Electric (75-CV-189) filed suit in the Northern District of New York.

16. Admiral (CA No. 75-531) filed suit in the Western District of Pennsylvania.

17. Appellants claimed below that the Commission consented to the orders in all of the cases, while the Commission claimed it consented to some but not all of the orders. For purposes of the motion to dismiss, the District Court below accepted appellants' allegations as true. Memorandum Opinion, *supra* note 7, at 5. Because our disposition on appeal does not turn on the number of orders that the Commission consented to, we do not feel it necessary to resolve the issue here or to remand it to the District Court.

18. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, *supra* note 5.

Rule 65(b) of the Federal Rules of Civil Procedure has been held to limit the duration of temporary restraining orders to a total of 20 days, absent consent by the party against whom the order was directed, *Sims v. Greene*, 160 F. 2d 512, 516 (3d Cir. 1947), the Commission did not object to requests for further extensions of the temporary restraining orders, with the result that oral argument on the manufacturers' preliminary injunction motions was not heard until July 23, and the stays against the Commission's releasing the information continued until those motions were decided. A preliminary injunction, which the Commission did oppose, was entered on October 23, 1975, prohibiting production of the data.[19] For whatever reason, the appellants did not seek to intervene in this action either to contest the manufacturers in Delaware or to have the action transferred to the District of Columbia. And despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the court did not on its own motion inquire about the necessity of joining appellants under Rule 19, FED. R. CIV. P.

After the District Court for the District of Delaware entered the preliminary injunction, the Commission filed an interlocutory appeal. The Commission subsequently filed a voluntary motion for dismissal of the appeal, however, and on May 10, 1976 the motion was granted.[20]

19. *Id.*

20. The Commission's motion is on file with the clerk of the Third Circuit, Docket Nos. 76-1095–76-1107.

On August 20, 1976 the District Court "closed out" the case with no further action planned.

III. THE DECISION BELOW

The instant FOIA litigation was filed in the District Court for the District of Columbia on May 5, 1975 and appellants promptly moved for summary judgment. The Commission and the manufacturers, however, moved to dismiss this action on the ground that no case or controversy existed between appellants and the Commission or, in the alternative, to stay the proceedings pending the decision in Delaware.

Four months later and 15 months after appellants initially asked the Commission for access to the documents, the District Court, without oral argument, filed an opinion and entered an order dismissing the action.[21] The District Court concluded that between appellants and the Commission there was no case or controversy since "on the crucial issue in this case"—the claim that the documents are subject to mandatory disclosure under the FOIA—appellants and the Commission "came to the exact same conclusion": that the documents had to be disclosed.[22] The only reason the Commission was not disclosing the documents, according to the court, was that it was prevented from doing so—first by the several temporary restraining orders and then by the preliminary injunction issued by the District Court for the District of Delaware. The court further concluded that, between

21. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7.

22. *Id.*, 400 F. Supp. at 851. This most definitely is not, however, "a situation in which [the Government] confesses error and represents that the error will be corrected without need for further court action." *Goosby v. Osser*, 409 U. S. 512, 516 n. 4 (1973), and cases cited therein.

appellants and the manufacturers, there was a failure to state a claim upon which relief could be granted.[23]

IV. The Issues on Appeal

We conclude that the District Court erred, and that there is a case or controversy[24] between appellants and the Commission. At its narrowest compass the case or controversy to be resolved concerns the threshold question of the scope and effect of the proceedings in Delaware. The Commission, echoed by the manufacturers, renews on appeal its argument—accepted by the District Court—that, although it would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so. Appellants disagree and deny that the preliminary injunction entered in Delaware absolves the Commission of what they believe is the Commission's statutory duty to furnish the requested documents.

This substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement.[25] The scope and

23. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 853.

24. "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Railway Commission,* 32 F. 241, 255 (Circuit Court, N. D. Cal. 1887) (Field, Cir. J.), *quoted in Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 239 (1937).

25. In his opinion in *Aetna Life Ins. Co. v. Haworth, supra* note 24, Chief Justice Hughes provided a now classic explanation of the requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action,[26] and the judgment entered by the Delaware District Court suggests no reason why it should be considered an exception.

Moreover, the Commission's conduct of the Delaware litigation provides a second, independent reason for rejecting appellees' contention that a case or controversy is lacking. In fact, reviewing both the administrative and litigational prelude to the instant appeal, the Commission's conduct, in several instances, is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed.[27] On

25. (Cont'd.)

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. • • •

300 U. S. at 240-241 (citations omitted).

26. *See* Restatement (Second) of Judgments § 68 (Tent. Draft No. 1, 1973); Advisory Committee Note, 39 F. R. D. 69, 106 (1966), *citing* Restatement of Judgments § 68, comment (h), § 116 (1942); F. James, Civil Procedure § 11.5, at 534-535 (1965); 1B J. Moore, Federal Practice ¶ 0.441[1] at 3772-3773 (Moore & Currier ed. 1974), *quoting Cromwell v. County of Sac,* 94 U. S. (4 Otto) 351, 352-353 (1877). *See also, e.g., Hansberry v. Lee,* 311 U. S. 32, 40-41 (1940); *Gonzales v. Cassidy,* 474 F. 2d 67, 72 (5th Cir. 1973); *Research Corp. v. Edward J. Funk & Sons, Co.,* 15 F. R. Serv. 2d 580 (N. D. Ind. 1971).

We take it to be established beyond cavil that, "[i]nsofar as the • • • judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred." *Goosby v. Osser, supra* note 22, 409 U. S. at 517 n. 5, *citing Louisiana v. United States,* 380 U. S. 145, 154 (1965); *Brown v. Board of Education,* 349 U. S. 294, 300 (1955).

27. For example, despite the time limits imposed on agencies which receive FOIA requests, 5 U. S. C. § 552(6) (1970), the Commission took nine months from the date of appellants' initial request

the basis of this record, we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution.

The existence of a case or controversy having been established, we must next consider its merits. That is, we must consider whether the Commission and the manufacturers or, alternatively, the appellants are correct in their assessment of the legal effect on this action of the Delaware judgment. At first glance appellees' position seems strong. The Delaware District Court preliminarily enjoined the Commission from releasing the contested documents, and that injunction has not been modified in any manner. It would thus appear that appellants' request may indeed be foreclosed.

Yet the correctness of this conclusion, toward which the Commission and the manufacturers urge us so enthusiastically, is not nearly as obvious as they would have us believe. The procedural history of the Delaware proceeding—as adduced by the District Court, as well as in the appellate briefs and at oral argument—is troubling and belies the apparent soundness of appellees' position. There is, first, the obvious and important fact that the Delaware District Court never did resolve the merits of the manufacturers' claim that the contested documents should not be released. Rather, the court limited itself to preliminary enjoining the Commsision from releasing the documents in dispute.[28] The opinion accompanying the injunctive order unmistakably confined itself to the propriety of relief *pendente lite*.[29] An order of that type is only "a conservative measure intended • • • to save all rights until the merits of the controversy can be definitely ascertained • • • . It is not an adjudication of rights in any proper sense of the term • • • [and] it does not follow that the

27. (Cont'd.)
for the documents to issue its determination that the documents could legally be released. *See* p. 7 *supra*. Even more "curious" (to borrow the description of the District Court below) is the fact that the Commission, "having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining order." *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 852. Also, as noted above, the Commission did not object to requests for further extensions. *See* p. 8 *supra*.

It is true that the temporary restraining orders were eventually replaced by a preliminary injunction, issuance of which was contested by the Commission. But it is the aftermath of the issuance of this preliminary injunction that constitutes perhaps the most disturbing aspect of the procedural history of this dispute. The Commission initially adopted the quite logical tack of filing an interlocutory appeal from the preliminary injunction. As recounted above, however, soon after filing the appeal *the Commission itself* filed a motion to have the appeal dismissed, and this motion was granted. *See* p. 9 *supra*. Since that time the Commission has evidently made not a single effort to have the District Court take any further action on the case or to have the Third Circuit consider on appeal the District Court's grant of the preliminary injunction. (We particularly stress the Commission's failure to pursue an appeal and its general inaction since the preliminary injunction was granted because these are uncontested facts that, obviously, were not before the District Court when it entered the order from which this appeal is taken.)

In large part, therefore, the prolonged delay and current legal stalemate in this dispute can be attributed to the Commission's inaction. Of course, absent lack of candor or other trifling with the court by the parties, questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court. *See, eg., Link v. Wabash R. Co.*, 370 U. S. 626, 633-634 (1962). However, the special nature of the manufacturers' suit in Delaware and its possible effect on Consumers Union and other potential FOIA plaintiffs require this court to pay closer than usual heed to the general background of this dispute and to the overall conduct of the parties.

28. *GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 375.

29. The Delaware court found that irreparable harm would attend disclosure of the documents, 404 F. Supp. at 375, and that the manufacturers had presented a "*prima facie* case showing a reasonable probability" that divulgence would be unlawful. *Id.* at 369, *quoting Oburn v. Shapp*, 521 F. 2d 142, 148 (3d Cir. 1975).

final adjudication will be in accordance with the interlocutory order." [30]

Standing alone the preliminary injunction, despite its impact on the agency, could not bar the FOIA action instituted by appellants in the District of Columbia. It would, of course, weigh heavily in any decision as to which of the two suits ought, "giving regard to conservation of judicial resources and comprehensive disposition of litigation," [31] to be stayed or enjoined pending the outcome of the other.[32] Here, however, there is no occasion to engage in the balancing that would ordinarily attend such a situation, for nearly a year after entry of the preliminary injunction the Delaware court entered an order "closing out" the case with no further action planned.

While the "close-out" language employed by the Delaware court finds no parallel in either that court's rules or the Federal Rules of Civil Procedures [sic], it does evince an understanding—apparently shared by the parties before it—that the suit had run its course. No one implies that any intervening determination on the merits has converted the interlocutory relief into a permanent injunction; [33] such

30. *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895). *Accord, Public Service Com'n v. Wisconsin Telephone Co.*, 289 U. S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 405 F. 2d 1321, 1324 (D. C. Cir. 1968).

31. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). *Cf. Columbia Plaza Corp. v. Security National Bank*, 525 F. 2d 620, 627 (D. C. Cir. 1975). *See also Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976), and cases cited therein; 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2] at 736-739 (Moore & Lucas ed. 1975).

32. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., supra* note 31, 342 U. S. at 183-184; *Columbia Plaza Corp. v. Security National Bank, supra* note 31, 525 F. 2d at 627-628.

33. Neither does anyone contend that the hearing on preliminary relief was *sub silentio* consolidated with a hearing on the merits. See Rule 65(a)(2), FED. R. CIV. P. In view of the strictures placed upon such a practice, that is not surprising. *See, e.g.,*

other possible interpretations of the Delaware court's order as suggest themselves tend toward the conclusion that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped.

With that, the preliminary injunction is dead.[34] When there is no prospect of an adjudication of the merits, relief that purports to be temporary, pending such an adjudication, is obviously superfluous. Whether this "closing out" acknowledges an informal—or even tacit— "settlement" between the Delaware plaintiffs and the Commission we need not inquire, since if it did such a settlement would be void as against public policy.[35] Thus the preliminary injunction need hardly be considered an insuperable barrier to the suit at bar.

Besides the absence of a disposition on the merits, the Commission's conduct of the Delaware litigation is a second factor that makes us reluctant to accept, without more,

33. (Cont'd.)
Brooks v. Nacrelli, 415 F. 2d 272, 275 (3d Cir. 1969), *on remand*, 331 F. Supp. 1350 (E. D. Pa. 1971), *aff'd*, 473 F. 2d 955 (3d Cir. 1973); *Willits v. Richardson*, 497 F. 2d 240, 244 (5th Cir. 1974); *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F. 2d 1055, 1057 (7th Cir. 1972); *Dry Creek Lodge, Inc. v. United States*, 515 F. 2d 926, 935 (10th Cir. 1975). *But cf. Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 337 (3d Cir. 1974); *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972).

34. *See, e.g., Wickes Corp. v. Industrial Financial Corp.*, 493 F. 2d 1173, 1176 (5th Cir. 1974); *Rio Hondo Harvesting Corp. v. Johnson*, 293 F. 2d 426, 427 (5th Cir. 1961); *Heasley v. United States*, 312 F. 2d 641, 648-649 (8th Cir. 1963); *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903), *cert. denied*, 193 U. S. 671 (1904). *Cf.* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 at 427 (1973); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 at 65-86 (Moore & Lucas ed. 1975). *See also United States v. Professional Air Traffic Controllers Organization*, 449 F. 2d 1299, 1300 (3d Cir. 1971).

35. *Cf. Petkas v. Staats*, 501 F. 2d 887 (D. C. Cir. 1974).

the contention that the Delaware proceedings preclude appellants' suit here. As described above,[36] the Commission was, in several respects, less than vigilant in espousing its putative view that the requested documents should be disclosed.

Yet another, related reason for declining to give the Delaware judgment the preemptive effect that appellees argue it deserves is the absence from the Delaware proceedings of any party requesting disclosure. Not only were the appellants in this case not participants in that suit, neither was any other private party besides the manufacturers. Given the Government's peculiar approach to those proceedings, therefore, the pro-disclosure position was all but unrepresented. This important consideration further attenuates any claim that the preliminary injunction is binding on appellants here.

V. Conclusion

Accordingly, we remand this case to the District Court for the District of Columbia.[37] The issue on remand will be, quite simply, whether or not the documents should in fact be disclosed. In resolving this issue the District Court for the District of Columbia offers a peculiarly appropriate forum. The party that possesses the requested information (*i.e.*, the Commission), the parties that requested the information (Consumers Union and Public

36. *See* pp. 12-13 & note 27 *supra*.

37. Jurisdiction in the District Court is predicated on 5 U. S. C. § 552(a)(4)(B) (Supp. V 1975), which provides that under the FOIA:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. • • •

Citizens), and the parties that supplied the information (the manufacturers) are all joined in the suit and are ready to present their respective views on the merits. We find no constitutional or procedural bar to adjudication.

Reversed and remanded.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

Order.

After considering the applications for rehearing filed by federal appellees, appellees Aeronutronic Ford Corporation, et al., appellees Admiral Corporation, et al., and appellee RCA Corporation, together with supporting memoranda, and appellants' response, it is

ORDERED by the Court that the applications for rehearing are denied for the reasons stated in the attached *per curiam*.

Per Curiam
For the Court
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

PER CURIAM: On June 14, 1974 appellants sought production of the documents in suit here under the Freedom of Information Act. Instead of producing the documents after determining that the Act required production, appellee Consumer Product Safety Commission (CPSC) notified intervenors of their intention to do so. Whereupon intervenors filed injunction proceedings against the CPSC in various district courts, including the District of Delaware, seeking to prevent production. Subsequently, the District Court in Delaware issued a preliminary injunction precluding production. Later that court ordered the case closed with the preliminary injunction still pending.

This appeal is from the dismissal of appellants' FOIA case by the District Court here on the ground that no case or controversy existed since the CPSC agrees with appellants that the documents should be produced but is prevented from doing so by the preliminary injunction in the "closed" Delaware case. We reversed, holding that a case or controversy did indeed exist because CPSC continues to refuse to produce the documents.

Since our ruling we are advised that the Delaware case was marked "closed" for statistical reasons in that the case had been inactive for some time. Also, within a few days after our ruling, the Delaware case suddenly became active with a hearing in court, at which a date for trial on the merits was set. Appellants here, however, who have been attempting since 1974 to obtain production of the documents under FOIA, and against whom the Delaware litigation is directed, are not parties to the Delaware litigation. *See* Rule 19, Fed. R. Civ. P. Since all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA.

5 U. S. C. § 552(a)(4)(B) (Supp. IV, 1974).* Since the Act also provides that actions under it should be expedited, 5 U. S. C. § 552(a)(4)(D) (Supp. IV, 1974), at long last so be it.

So ordered.

* It is noteworthy that the Department of Justice has moved to transfer the Delaware case to the District of Columbia.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

Order.

On consideration of the suggestions for rehearing *en banc*, and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestions are denied.

Per Curiam
For the Court:
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

Re: GTE Sylvania, Incorporated, et al. v. Consumers Union of the United States, et al., No. 77-508

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

MICHAEL RODAK, JR., Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

MOTION TO SET BRIEFING SCHEDULE.

Appellees GTE Sylvania Incorporated, RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Toshiba-America, Inc., General Electric Corporation, and Admiral Corporation hereby move this Court for an order setting a briefing schedule in the above-captioned action. In support of this motion, appellees state as follows:

1. The complaint in this case was filed on May 5, 1975, by Consumers Union of the United States, Inc., and Public Citizen's Health Research Group seeking an order directing the Consumer Product Safety Commission ("CPSC") to disclose under the Freedom of Information Act approximately 120,000 pages of "TV-related accident data" obtained by the CPSC from a number of television manufacturers. Twelve manufacturers were joined with the CPSC as defendants.

2. On September 5, 1975, Judge Richey granted motions by the defendants to dismiss. The District Court

held that as to the CPSC, the complaint presented no "case or controversy," and as to the manufacturers, the complaint failed to state a claim upon which relief could be granted.

3. On July 5, 1977, this Court entered a Judgment and Opinion reversing the order of dismissal entered by Judge Richey and directing that Judge Richey proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed." Timely petitions for rehearing with suggestion for rehearing *en banc* were denied on August 25, 1977. On September 9, 1977, this Court granted a stay of its mandate to and including October 3, 1977, pending the filing of petitions for writ of certiorari with the United States Supreme Court.

4. The appellee-manufacturers filed a petition for writ of certiorari with the United States Supreme Court on October 3, 1977. *GTE Sylvania Inc., et al. v. Consumers Union of the United States, Inc., et al.*, No. 77-508. After receiving a 20-day extension of time, appellants Consumers Union and Health Research Group filed an opposition on November 23, 1977.

5. On December 8, 1977, the United States District Court for the District of Delaware (Latchum, C. J.) entered a Judgment and Opinion in *GTE Sylvania Inc., et al. v. Consumer Product Safety Commission, et al.*, C. A. Nos. 75-104, *et al.*, permanently enjoining the CPSC from releasing to the public the same "TV-related accident data" at issue in this proceeding. Copies of that Judgment and Opinion are attached as Exhibits 1 and 2, respectively, to the Motion to Lodge Exhibits accompanying the instant motion.

6. On January 16, 1978, the United States Supreme Court entered the following order in *GTE Sylvania Inc., et al. v. Consumers Union of the United States, Inc., et al.*, No. 77-508:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

7. It is respectfully submitted that further briefing by the parties is warranted as an aid to this Court in complying with the Supreme Court's directive to further consider this case in light of the Delaware court's permanent injunction. Appellees suggest that the following schedule be adopted:

(a) Appellees to file briefs within 45 days after entry of the order setting briefing schedule;

(b) Appellants to file answering briefs within 30 days; and

(c) Appellees to file reply briefs within 14 days.

Respectfully submitted,

[Signatures of Counsel Deleted]

Dated: January 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

APPELLANTS' MOTION TO SET BRIEFING SCHEDULE ON REMAND.

On July 14, 1977, this Court issued its opinion reversing the decision of the district court and remanding the case for consideration on the merits. 561 F. 2d 349. Appellees filed various petitions for rehearing, with suggestions for rehearing *en banc,* which were denied in orders issued August 25, 1977. 565 F. 2d 721. Thereafter, the non-federal appellees (ten manufacturers of television sets) filed a petition for a writ of certiorari in the Supreme Court which was opposed by both appellants and the federal appellees. While that petition was pending, the United States District Court for the District of Delaware entered a permanent injunction in a related case in favor of the manufacturers against the federal parties. This fact was called to the attention of the Supreme Court in a supplemental brief by the manufacturers and urged as a further basis for granting full review, or in the alternative, for summarily vacating the judgment of this Court and directing this Court to affirm the district court's dismissal in light of the permanent injunction in Delaware. Those suggestions were specifically opposed by appellants in a supplemental memorandum filed in the Supreme Court. The Supreme Court entered its order on January 16, 1978, in which it granted the writ, and summarily vacated the decision of this Court and remanded to this Court for further consideration in light of the permanent injunction in Delaware.

Although appellants contend that the permanent injunction has no effect on their right to pursue this Freedom of Information Act action, since they were not parties to the Delaware action and no attempt was ever made to join them there and that therefore it would be appropriate for this Court to enter an order simply reaffirming its prior decisions, it may be that the Court would desire further briefing on the question. If that is the case, appellants believe that it would be proper for those parties who contend that the issuance of the permanent injunction is a reason for a modification of this Court's prior rulings to submit their briefs within fourteen days, with replies due ten days thereafter. This schedule is more than adequate since the issue has largely been briefed in the Supreme Court already, and, as this Court recognized in its orders on rehearing, this case is entitled by statute to expeditious treatment. 5 U. S. C. § 552(a)(4)(D).

Respectfully submitted,

[Signatures of Counsel Deleted]

Dated: Washington, D.C.
February 24, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before WRIGHT, *Chief Judge*, and BAZELON and ROBINSON, *Circuit Judges*.

Order.

Filed September 20, 1978

Upon consideration of the respective motions of appellants and appellees to set a briefing schedule, it is

ORDERED by the Court that the parties file, within 20 days from date of this order, memoranda in typewritten form setting forth their views as to the course this Court should take in light of the remand of the case by the Supreme Court to this Court for further consideration. The parties are instructed to address with particularity the question whether the permanent injunction entered in *GTE Sylvania v. Consumer Product Safety Commission*, Civ. No. 75-104 (D. Del. Dec. 8, 1977), bars appellants, who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed.

Per Curiam

For THE COURT

GEORGE A. FISHER
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.*

October 23, 1975

Opinion.

LATCHUM, *Chief Judge*.

In these thirteen separate actions, each plaintiff, a manufacturer of television receivers, seeks a preliminary injunction restraining the Consumer Product Safety Commission ("Commission"), its members and officers from disseminating certain information to the public which the plaintiffs contend is privileged, confidential, misleading and inaccurate.

Congress, in 1972, enacted the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2051 et seq., in order to "establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products."[1]

* Consolidated with, RCA Corp., 75-108; Magnavox Co., 75-112; Zenith Radio Corp., 75-113; Motorola, Inc., 75-114; Warwick Electronics, Inc., 75-115; Aeronutronic Ford Corp., 75-116; Teledyne Mid-America Corp., 75-122; Admiral Corp., 75-131; General Electric Co., 75-136; Matsushita Electric Corp. of America, 75-150; Sharp Electronics Corp., 75-151; and *Toshiba America, Inc. v. Consumer Product Safety Commission*, 75-152.

1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

"(1) to protect the public against unreasonable risks of injury associated with consumer products;

To implement and administer this legislative policy, the Act established the Commission as an independent regulatory agency. Shortly after its creation, the Commission became concerned about the safety of television sets. During the spring and summer of 1974, the Commission sought and obtained television-related accident data from television manufacturers in three ways: by a general public request for information, by a special order pursuant to 15 U. S. C. § 2076(b)(1), and finally by the issuance of subpoenas duces tecum pursuant to 15 U. S. C. § 2076 (b)(3). Upon receipt of such information, the data was consolidated and a computer printout was prepared which listed the alleged accident separately. On March 28, 1975, the Commission decided to release to the public the bulk of the television-related accident material in its possession which it had gathered from the plaintiffs.

Subsequently, each of the thirteen plaintiffs brought a suit against the Commission [2] for an injunction prohibiting the public dissemination of the information obtained from each on the ground that such information was privileged, confidential, misleading and inaccurate. The thirteen

1. (Cont'd.)

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U. S. C. § 2051(b).

2. In addition to the Commission, the following members, officers and employees were named as defendants: Richard O. Simpson, Chairman, Constance B. Newman, Vice Chairman, R. David Pittle, Lawrence M. Kushner, Barbara Hackman Franklin, Commissioners, Sadye E. Dunn, Secretary, and Vince DeLuise, Freedom of Information Officer. They will be referred to collectively as the "Commission" or "defendants."

actions were consolidated [3] for a hearing on plaintiffs' motions for preliminary injunctive relief. The defendants also consented to the entry of a temporary restraining order [4] prohibiting the public disclosure pending the Court's decision on plaintiffs' present motions.[5]

I. Background

In March 1974, the Commission issued a public notice [6] announcing that it would hold a public hearing to investigate the hazards encountered during the operation of television receivers and to consider the necessity of developing safety standards for such receivers. By this notice, the Commission sought certain technical information and TV-related accident data from manufacturers of television sets and the component parts thereof. The notice described the accident data sought in part as follows:

> "Although the hearing is intended to emphasize fires and shocks related to TV sets, information pertaining to all aspects of TV set safety may be submitted (with the exception of radiation hazards . . .).
>
> • • •

3. Docket Item 10 (C. A. No. 75-104).

4. Docket Item 3 (C. A. No. 75-104). The temporary restraining order was later modified to permit release of the gathered information to four employees of Underwriters Laboratories, Inc., which had been retained by the Commission to develop safety standards for television receivers. In addition the data without identification of manufacturer, model or chassis number was authorized to be released to Underwriters Laboratories, Inc. and other individuals involved in developing the safety standards. Docket Item 34 (C. A. No. 75-104).

5. Defendants also moved for summary judgment in each case (Docket Item 35, C. A. No. 75-104), but these motions are not presently before the Court. (Docket Item 42, p. 3, C. A. No. 75-104).

6. 39 Fed. Reg. 10929 (March 22, 1974).

> . . . In particular, each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 'Electronic Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, place (sic) indicate the procedures used." [7]

Although a few manufacturers complied with the Commission's general request for data, their principal response consisted of a six page summary of accident data supplied by the Electronics Industry Association ("EIA").[8]

After reviewing the data voluntarily submitted, the Commission concluded that "the information submitted to the Commission by the EIA on behalf of the [Companies did] not satisfy the Commission's request." [9] Thus on May 13, 1974, the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1),[10] sent special orders to twenty-five manufacturers of television receivers and components.[11] The information sought by these special orders

7. *Id.* 10930.

8. Par. 5 Affidavit of Constance B. Newman, Vice Chairman of the Commission ("Newman Aff'd") Docket Item 27, C. A. No. 75-112.

9. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

10. 15 U. S. C. § 2076(b)(1) provides: "The Commission shall have the power—(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine."

11. Of the plaintiffs here, only RCA did not receive a special order. Newman Aff'd, par. 6.

was broken down into six categories: (1) TV-related accident data, (2) Current, future-planned and suggested TV-related safety standards, (3) Quality control and quality assurance plans, (4) Service technicians, (5) Improvement plans for presently used sets, and (6) Specific technical areas.[12]

The instructions for the TV-related accident data category provided:

> "You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in 1969 'Electronics Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, please indicate the procedures used." [13]

In the cover letter [14] accompanying the special orders, the Commission "[recognized] that some of the information to be submitted [might] be proprietary" and referred the manufacturer to certain statutory provisions [15] designed to protect confidential information supplied to the government. The Commission encouraged compliance by stating in the cover letter:

> "This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public."

12. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

13. *Id.*

14. *E.g.*, Letter of Richard O. Simpson, Chairman of the Commission, to General Electric Company, May 13, 1974. (Docket Item 11A, Ex. A-1, C. A. No. 75-136).

15. 15 U. S. C. § 2055(a)(1), 5 U. S. C. § 552(b)(4) & (7), 15 U. S. C. § 2055(a)(2), and 18 U. S. C. § 1905.

However, the possibility of a request for public access to this information by way of the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, was noted, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to "substantiate" any such claims. Claims of confidentiality accompanied the response of most manufacturers.[16]

Again, the Commission was not satisfied with the data supplied by the manufacturers pursuant to the special orders and the companies were notified as follows:

> "The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.
>
> Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act [15 U. S. C. § 2076(b)(3)] which specifies the additional information required.
>
> It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act [15 U. S. C. § 2076(c)] lead to entry of a court order against you directing compliance with the Commission's subpoena." [17]

16. *E.g.*, Letter of H. C. Burgess, General Electric Co., to Richard O. Simpson, Chairman of the Commission, May 29, 1974. Docket Item 11A, Ex. A-2, C. A. No. 75-136.

17. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission, to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136).

Thus, on July 26, 1974 subpoenas duces tecum were issued to the plaintiffs and three other TV manufacturers [18] requiring the production of certain technical information and all television-related accident data [19] as follows:

> "All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term 'reports', includes, but is not limited to, all physical forms of: correspondence, letters; telegrams; cables; tapes; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases, bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both origi-

18. Sony Corp., Sanyo Electric, Inc., and Wells-Gardner Electronics Corp. were subpoenaed but did not seek to bar public disclosure of data which they forwarded to the Commission. Newman Aff'd, par. 8. Apparently, the Commission did not order all manufacturers of TV sets sold in this country to submit accident reports. Deposition of Robert L. Northedge ("Northedge Dep.") p. 78. Northedge, an electrical engineer, employed by the Bureau of Engineering Science of the Commission was project manager of the Commission's investigation of television hazards.

19. *E.g.*, subpoena duces tecum addressed to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136). Prior to serving the subpoenas the Commission had been warned of the confusion that might result from the problem of defining a TV-related accident. Letter of A. E. Allen, Philco-Ford Corp. to the Commission, May 28, 1974 appended to Joint Memorandum of GTE Sylvania and Aeronutronic Ford Corp. in support of motion for preliminary injunction (Docket Item 24, C. A. No. 75-104). Evidently, there is no standard definition of TV-related accidents. Northedge Dep. pp. 29-32. Moreover, the brief preface of the subpoenas referred to the Commission's "investigation of shock and fire hazards associated with television receivers," but the body of the subpoenas designated "[a]ll TV-related accident reports."

nals and copies whether or not sent or received. The term 'reports' includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969 and also those reports maintained on any and all forms substituted for the attached sample EIA form." [20]

Standards of reliability and accuracy for the data sought were indicated on sample data forms accompany-the subpoenas.

"The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect." [21]

The Commission sought unverified information intentionally because it wanted to obtain as large a data base as possible.[22] Again, accident reports supplied in compliance with the subpoena duces tecum were accompanied by claims of confidentiality.[23] However, the Commission did not mention the issue of confidentiality in either the subpoena or the cover letter.

In order to reduce the information contained on the approximately 120,000 pieces of paper received in response to the subpoenas duces tecum to a manageable form, the

20. The description of TV-related accident data was identical for each subpoena. On the other hand, the technical information requested did vary slightly from manufacturer to manufacturer, but, generally, it corresponded to the materials sought in the May 13, 1974 special order. (Newman Aff'd, par. 9.)

21. Docket Item 35, C. A. No. 75-104.

22. Northedge Dep. pp. 169, 200, 258.

23. Newman Aff'd, par. 10; *E.g.*, Letter of F. R. Wellner, General Electric Co., to Sayde E. Dunn, Secretary of the Commission, October 22, 1974 (Docket Item 11A, Ex. A-4, C. A. No. 74-136).

Commission retained Tracor-Jitco, Inc. ("Tracor") to extract and categorize the data contained in the accident reports.[24] This consolidation of information was designed to assist the organization engaged in developing safety standards and also to make the accident data more meaningful to members of the public who might inspect it under the Freedom of Information Act.[25] Data summary sheets were prepared by gleaning from accident reports the appropriate responses for the several categories.[26] Although many reports did not contain enough data to answer each question,[27] the Commission was seeking as much information in manageable form as possible.

Tracor was responsble for transferring information from the accident reports to the data summary sheets from which the computer cards could be keypunched. In order to ensure that Tracor's employees performed the tasks accurately, Tracor's supervisor initially reviewed every sheet and later performed random checks by comparing the extracted data against the original report. Also, Robert A.

24. Newman Aff'd, pars. 10, 15.

25. Northedge Dep. pp. 24-25; Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

26. A memorandum from Edward J. Cull, Office of General Counsel, to the Commissioners ("Cull-Memorandum") 2, March 21, 1975 (Docket Item 11A, Ex. A-7, C. A. No. 75-136) lists twenty-five categories of extracted information: (1) file number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. The Newman affidavit indicates that there were twenty-seven categories of information. Newman Aff'd, par. 15(a).

27. Northedge Dep. pp. 190-94.

Yereance, a consultant retained by the Commission, screened the same sheets that the Tracor supervisor examined. Finally, Robert L. Northedge, the Commission project manager, reviewed some of the abstracts.[28]

Then, the information on the data summary sheets was keypunched by another organization under contract with the Commission and was read into a Commission computer program which produced a printout of the information previously coded.[29] The printout was reviewed but only about fifty individual accident reports were checked against their summaries on the computer printout.[30]

At this point, there were 10,765 separate line items;[31] each line item represented a separate report. Tracor next undertook a duplication search. The duplication search was carried out by selecting a particular category of information and grouping the reports according to a common parameter within that category. For example, the accidents reported were grouped by the states in which they occurred; they were also grouped alphabetically by the initials of the victim; listing model numbers consecutively constituted another method. After grouping, summaries exhibiting the same classifying parameters were inspected for other similarities. When the comparison indicated that the reports might be related, the original accident reports were examined.[32] As a result of this endeavor, separate reports of the same incident were consolidated and exact duplicates were eliminated. This winnowing procedure reduced the number of accident reports to 7,620.[33]

28. *Id.* pp. 216-20. It was not considered necessary to review every data sheet. *Id.* p. 219.

29. At least 99 percent of the accident reports summarized on the computer printout were obtained through the subpoenas duces tecum. *Id.* p. 247.

30. *Id.* p. 112.

31. *Id.* p. 221.

32. *Id.* pp. 223-225.

Tracor also classified as confidential the identity of the victim and any documents encompassed by the work product doctrine and the attorney-client privilege.[34] This information, therefore, has been excluded from the filed accident reports and computer printout.[35]

A Commission consultant, Robert A. Yereance, prepared a report captioned "Analysis of TV Accident Data"[36] ("Yereance Report"), the purpose of which was stated to be as follows:

> "To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, 'Analysis of TV Accident Data.' This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The

33. Newman Aff'd, par. 17.

34. *Id.* par. 15(c).

35. *Id.* par. 17.

36. Docket Item 41, C. A. No. 75-104. The temporary restraining order initially covered the Yereance Report. See note 4, *supra.* However, subsequent modification of that order (Docket Item 34, C. A. No. 75-104) provided that the Yereance Report, absent objection from plaintiffs, could be forwarded to Underwriters Laboratories, Inc. and those individuals assisting that organization in the development of safety standards.

purposes of this report were to answer basic questions concerning TV-related hazards to provide a picture of the magnitude or relative significance of hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards." [37]

The requirement that manufacturers submit reports of dubious validity apparently reflected the Commission's concern that limiting the subpoenas to only verified reports would result in a data base which would be too small for proper analysis.[38] Also, it was thought that trends indicating design inadequacies of a particular manufacturer might appear.[39] However, the Commission never attempted to distinguish the verified reports from the unverified reports.[40] Indeed of the more than 7,600 tabulated reports, the Commission investigated less than 100 of them.[41]

Furthermore, the confusion generated by the lack of a clear definition of "TV-related accident" [42] is aptly reflected in the following dialogue between counsel for RCA and the Commission's project manager, Robert L. Northedge:

"Q. [By Mr. Tiger] Mere speculation is enough to characterize it as a TV-related accident?

A. [By Mr. Northedge] For the purposes for which we subpoenaed this information, yes.

Q. Is it proper to characterize as a TV-related accident the situation where someone is watching tele-

37. Newman Aff'd, par. 18.
38. *Id.* par. 9; Northedge Dep. pp. 169, 200, 258.
39. Northedge Dep. pp. 242-43.
40. *Id.* p. 262.
41. *Id.* p. 43.
42. See note 19 *supra*.

vision while smoking a cigarette and the lit cigarette falls in the cushioning of a chair and starts a fire?

(Whereupon, the reporter read the pending question.)

THE WITNESS: I wouldn't think that would be proper.

Q. [By Mr. Tiger] What if, during the fire, the TV caught on fire?

A. [By Mr. Northedge] It would be classified as a TV-related accident.

Q. Is it proper to characterize as a TV-related accident the situation where a fire results from defective wiring in the house and the point of origin of the fire happens to be in the area of the television set?

A. Yes, because it is possible that the TV could have—we don't know, but it is possible that the TV could have caused the short circuit in the wall outlet.

Q. What if the TV didn't cause the short circuit in the wall outlet, it was caused by something else?

A. Well, in many cases we don't know this so it is entered as a TV-related fire.

Q. Is it proper to characterize as a TV-related accident, the situation where a burning candle sitting on top of a television set melts the cabinet?

A. Yes." [43]

Thus, it appears that an accident which would have been "TV-related" in one view could feasibly be perceived by another as not being "TV-related." That the Commission was well aware of the confusion and its consequences is

43. Northedge Dep. pp. 120-21. The following would also be classified as "TV-related accidents": cutting a finger on a screw protruding from a TV cabinet, *id.* p. 35; sustaining a hernia while carrying a TV set, *id.* pp. 35, 116; fire caused by a candle that had been placed on top of a TV cabinet, *id.* pp. 172-73.

clearly reflected in an internal memorandum which reads in part:

> "It should be noted that some manufacturers appear to have submitted accident reports pertaining to fire and shock incidents only. Whereas, other manufacturers have submitted incident reports on TV tube implosions, carrying handle failures; (sic) instability of TV stands, etc., as well as incident reports on fire and shock." [44]

Moreover, although some manufacturers did not comply fully with the subpoena, the Commission never made any effort to compel the appropriate response [45] because it had made "a technical judgment that sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commission's regulatory development activities for TV receivers." [46]

Finally, the Commission's disclaimer accompanying the release to the public of the data submitted by manufacturers who are not parties to these actions focused on another critical source of inaccuracy:

> "The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious then (sic) others in maintaining television accident files." [47]

44. Bureau of Engineering Sciences of the Commission, "Report on Subpoena Compliance," Dec. 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

45. Northedge Dep. pp. 259-61.

46. Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

47. Newman Aff'd, par. 28. "It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher

Notwithstanding this melange of inaccuracies, the Commission reached a final decision on March 28, 1975 [48] to release to the public the TV-related accident data and the computer printout compiled from the information obtained from the plaintiffs.[49] In deciding to release this information to the public, the Commission relied [50] upon a memorandum [51] prepared by its Office of General Counsel. The reasons for the disclosure are not clearly and explicitly set forth in this memorandum. However, it does state,

47. (Cont'd.)
accident rate for one particular TV model than similar models because more complete records were maintained." Cull Memorandum, p. 7.

48. Newman Aff'd, par. 19. The Commission on August 21, 1974 apparently had promised the plaintiffs that the Secretary would first make an initial determination of the disclosure issues and that the Secretary's decision could be appealed to the Commission. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission to H. B. Walden, General Electric Co., August 2, 1974 (Docket Item 11A, Ex. A-5, C. A. No. 75-136). Despite this promise, the decision on disclosure was made by the Commission initially and the possibility of an appeal was foreclosed. See Cull Memorandum, p. 4. Thus, no hearing was held on the claims asserted by the plaintiffs. Furthermore, the letter notifying the plaintiffs of the Commission's decision to release the accident data provided only for a minimum of ten days before disclosure. *E.g.*, Letter of Vince DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104). Telegrams from the Commission eventually fixed May 1, 1975 as the proposed date of disclosure (Docket Item 11A, Exs. A-8, A-9, C. A. No. 75-136).

49. These materials will be referred to as "information" or "accident data." The Commission evidently does not intend to release the technical information that it obtained from the plaintiffs. Newman Aff'd, par. 20; Docket Item 42, p. 53, C. A. No. 75-104. After the decision to disclose was reached by the Commission, the Yereance Report was prepared.

50. Newman Aff'd, par. 19.

51. Cull Memorandum. A copy of this memorandum is included in what the Commission terms its administrative record in each case. *E.g.*, Docket Item 35, C. A. No. 75-104.

"The release of the acident data would assist consumers to better evaluate the safety of TVs." [52] No other affirmative reason in support of disclosure was offered.[53]

In her affidavit of June 27, 1975 submitted during the course of this litigation, the Commission's Vice Chairman also asserted that "disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers," and "would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set" and "that the large data base of TV-related accidents that [the Commission] had compiled would be useful to other parties interested in investigating the potential hazards associated with television receivers." [54]

On the other hand, the numerous sources of inaccuracy compelled the Commission's consultant, Robert A. Yereance, to disagree with the Commission's decision to disclose the data. According to Northedge, "he didn't feel that much of it should be released at all." [55] Furthermore, even Northedge concluded that the public could not meaningfully utilize the data as a valid basis for comparing the

52. *Id.* p. 5. Also the Commission's letter informing the plaintiffs of its disclosure decision mentioned "public health and safety" as a reason for disclosure. *E.g.*, Letter of DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania, Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104).

53. The bulk of the memorandum purports to establish that the Commission can release the data to the public under the Freedom of Information Act, 5 U. S. C. § 552. The impact of the Freedom of Information Act on the present actions will be discussed later in this opinion. See notes 73-76 and accompanying text, *infra*.

54. Newman Aff'd, par. 29. The propriety of considering these justifications raised initially in these proceedings is considered later. See notes 64 and 71 and accompanying text *infra*.

55. Northedge Dep. p. 146.

safety of the various manufacturers' televisions.[56] In sum, it is apparent that the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plaintiffs.

II. Plaintiffs' Contentions.

The manufacturers have made numerous arguments in support of their contentions that disclosure of this information would be improper and that issuance of a preliminary injunction prohibiting disclosure would be appropriate.[57]

56. *Id.* pp. 179, 256. This point was conceded by the defendants at oral argument (Docket Item 42, p. 74, C. A. No. 75-104). Northedge's final comments at his oral deposition clearly show that he, as project manager, could discern no benefit to the public of such disclosures. For example (Northedge Dep. pp. 276-277):

> "Q. [By Mr. Palmer] Well, you have previously testified that the data is not meaningful as a basis for consumers to make comparative safety assessments among the different manufacturers. What purpose is served by the release of the identity of particular manufacturers other than to facilitate such a concededly invalid comparison?
>
> A. [By Mr. Northedge] I don't know what purpose there would be.
>
> Q. In other words, you can't think of any purpose that would be served by that?
>
> A. Offhand, I cannot think of any purpose."

The Commission has offered plaintiffs the opportunity to come forward with information that would "substantiate" their claims of inaccuracy or duplication. Aff'd of Sheldon D. Butts, Assistant Secretary of the Commission, par. 2 (Docket Item 35, C. A. No. 75-104); Newman Aff'd, par. 27.

57. Although the manufacturers individually have raised different issues and stressed different arguments, their contentions are considered collectively. Also, while raising the same general issue individual plaintiffs may have emphasized uniquely perceived nuances. Therefore, even though the principal arguments are indicated, the list should not be viewed as an all inclusive catalogue.

First, the plaintiffs assert that release of the information is prohibited by 15 U. S. C. § 2055(a)(2) which provides that information obtained by the Commission which "relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed." The accident reports are viewed as being within a protected category.

Second, the Freedom of Information Act, 5 U. S. C. § 552, and 15 U. S. C. § 2055(a)(1) which refers to the FOIA are perceived as conferring upon the plaintiffs an affirmative right to block public release of the information.

Third, the Commission is charged with having violated 15 U. S. C. § 2055(b)(1) which in part requires the Commission to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

Fourth, the manufacturers challenge the procedure followed by the Commission in deciding to release the data. The Commission is said to have failed to promulgate rules to accommodate its information dissemination functions as required by FOIA, 5 U. S. C. § 552(a)(1), and to have failed to provide notice thirty days prior to public disclosure of the information and to supply a summary of the information destined for disclosure as mandated by 15 U. S. C. § 2055(b)(1), and to have failed to comply with an earlier promise of an administrative appeal.

Fifth, the plaintiffs maintain that the Commission is estopped from disclosing the information because of the Commission's representation to the manufacturers that the material obtained would not be made public.

Finally, an accusation of having violated the Due Process Clause of the Fifth Amendment is brought against the Commission. This constitutional argument is founded upon both alleged procedural deficiencies and the arbitrary nature of the Commission's decision to make public the previously confidential information.

III. Jurisdiction and Scope of Review.

Although the plaintiffs have pleaded several jurisdictional grounds,[58] the Court finds that it has jurisdiction of this matter by virtue of 28 U. S. C. § 1337, which provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

First, the general purpose of the Act to protect individuals who use consumer goods suggests a Congressional intention to regulate commerce.[59] Second, and more importantly, the regulation of commerce aspect of this legislation was explicitly set forth in 15 U. S. C. § 2051(a)(6).

> "The Congress finds that—
>
> * * *
>
> regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter."

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58. Among the asserted bases for jurisdiction are 28 U. S. C. §§ 1331, 1332, 1346, 1361, 2201-02 and 5 U. S. C. §§ 702, 704. While some plaintiffs failed to mention the source of jurisdiction upon which the Court relies, it is nevertheless appropriate for the Court to recognize the applicability of § 1337 to those plaintiffs' claims. *Cf. Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 (1904).

59. *See, e.g.*, S. Rep. No. 835, 92d Cong., 2d Sess. 7 (1972); H. R. Rep. No. 1153, 92d Cong., 2d Sess. 21-24, 26-27 (1972), U. S. Code Cong. & Admin. News 1972, p. 4573.

Thus, it is clear that the Act can be included under the umbrella of § 1337.[60] Furthermore, § 1337 constitutes an appropriate basis for the review of an administrative determination. *Davis v. Romney,* 490 F. 2d 1360 (C. A. 3, 1974); *General Motors Corp. v. Volpe,* 457 F. 2d 922 (C. A. 3, 1972), *aff'g* 321 F. Supp. 1112 (D. Del. 1970).

Closely akin to the issue of jurisdiction is the question of plaintiffs' standing to seek the requested relief.[61] First, adverse publicity and harm to commercial reputation which would likely result from the proposed disclosure would amount to "injury in fact." Second, the requirements of 15 U. S. C. § 2055(b)(1) that the Commission take reasonable steps to assure accuracy and that disclosure be fair in the circumstances reflect a concern for the impact that inaccuracies and misleading public releases might have on manufacturers whose products were being investigated by the Commission. Thus, the interests which the plaintiffs seek to preserve are "arguably within the zone of interests to be protected" by 15 U. S. C. § 2055(b)(1). *Data Processing Service v. Camp,* 397 U. S. 150, 151-154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970); *Merriam v. Kunzig,* 476 F. 2d 1233 (C. A. 3, 1973), *cert. den. sub nom. Gateway Center Corp. v. Merriam,* 414 U. S. 911, 94 S. Ct. 233, 38 L. Ed. 2d 149.

Judicial review of administrative actions, of course, is governed by the Administrative Procedure Act, specifically

60. It should also be noted that when the Act was codified in the United States Code, it was placed in Title 15, which deals with trade and commerce.

61. See also 5 U. S. C. § 702 (Administrative Procedure Act) which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U. S. C. §§ 701-706.[62] It is clear "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967). No statute prohibits review of Commission action, and nothing has been found to suggest that Congress intended to confer upon the Commission unreviewable discretion as defined in 5 U. S. C. § 701 (a)(2), a provision which has been given a very narrow interpretation. *E.g., Adams v. Richardson,* 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973). Because the Commission plans no further proceedings before releasing the data, the finality requirement has also been satisfied.

Although plaintiffs are requesting a preliminary injunction, this action, nevertheless, amounts to a review of an administrative determination, and while the heavey [sic] burden imposed on a party seeking a preliminary injunction must be met fully, it is still necessary to define with some precision the scope of review open to this Court.

The appropriate scope of review of the Commission's decision to disclose the accident data is defined in 5 U. S. C. § 706(2)(A):

"The reviewing court shall—

* * *

62. 5 U. S. C. § 701(a) provides:

> "This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U. S. C. § 704 provides in part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discetion [sic], or otherwise not in accordance with law."

Thus, the Court can prevent disclosure of accident data only if the Commission's actions fall beyond the permissible discretionary range defined by the "arbitrary and capricious" standard. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 413-15, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Camp v. Pitts*, 411 U. S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); *A. O. Smith v. FTC*, 403 F. Supp. 1000 (D. Del., filed September 22, 1975).[63] In *Overton Park, supra*, at 416, 91 S. Ct. 814, 823, district courts were instructed that in applying the "arbitrary and capricious" standard, they "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Furthermore, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285-86, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974). Therefore, although the Court must review the events below with great care, the plaintiffs, nevertheless, must make a clear and convincing showing that the Commission erred and exceeded the bounds of its discretion in deciding to release the accident data.

63. The only other conceivable standards are the "de novo" review provided for by 5 U .S. C. § 706(2)(F) and the "substantial evidence" test of 5 U. S. C. § 706(2)(E). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, make it clear that these approaches are not applicable here. See *A. O. Smith, supra* at 1005.

Also, it is necessary to determine what materials may be considered in reviewing the Commission's actions. "In applying [the 'arbitrary and capricious'] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, supra* 411 U. S. at 142, 93 S. Ct. at 1244. This language, the Commission contends,[64] precludes consideration of the Northedge Deposition and the affidavits submitted by both the plaintiffs and defendants. However, in both *Camp v. Pitts, supra* at 142-143, 93 S. Ct. 1241, and *Overton Park,*[65] *supra* 401 U. S. at 420, 91 S. Ct. 814, the Supreme Court recognized that there are occasions when the reviewing court is justified in going beyond the limited administrative record. Although an inquiry of this nature should, as a general rule, be avoided, *United States v. Morgan*, 313 U. S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); *South Terminal Corp. v. EPA*, 504 F. 2d 646, 675 (C. A. 1, 1974); *National Nutritional Foods Ass'n v. FDA*, 491 F. 2d 1141 (C. A. 2, 1974), *cert. den.* 419 U. S. 874, 95 S. Ct. 135, 42 L. Ed. 2d 113, it is essential in this case in order for the Court to have sufficient information to consider rationally the Commission's actions. *See Nuclear Data, Inc. v. AEC*, 364 F. Supp. 423, 425 (N. D. Ill. 1973).[66]

64. Memorandum in Support of Defendants' Motions for Summary Judgment and Opposition to Plaintiffs (sic) Motions for Preliminary Injunction at 8-9, n. 1 (Docket Item 35, C. A. No. 75-104).

65. The present proceeding, as did *Overton Park, supra*, involves agency action that cannot be classified as either adjudicatory or rule making. See *Texas v. EPA*, 499 F. 2d 289, 296 (C. A. 5, 1974).

66. In somewhat similar circumstances, a district court has been ordered to hold an evidentiary hearing before applying the "arbitrary and capricious" standard. For example, in *Charles River Park "A", Inc. v. HUD*, 519 F. 2d 935 (C. A. D. C., 1975), the plaintiffs sought to prohibit HUD from disclosing to Boston's

Three sources of information not found in the record [67] have been offered to the Court; the deposition of the Commission's engineer and accident data program manager, Robert L. Northedge; the affidavit of Vice Chairman Newman; and affidavits of officers of the plaintiffs.[68] Proper analysis of the uses of the Northedge Deposition and Newman Affidavit in these proceedings requires that descriptions of the data and the Commission's procedure for processing the data be separated from possible explanations of the Commission's decision to release the accident data. Before it can reasonably apply the appropriate legal standards, the Court must first be apprised of the nature of data collected, the value of the data and computer printout to someone studying TV-related accidents, and the means by which the Commission collected and processed the data. The Northedge Deposition and the first twenty-eight paragraphs of the Newman Affidavit provide that information. Neither probing the mental processes of the Commission's officials nor seeking knowledge outside the Commission's own limited sphere is involved.

66. (Cont'd.)
Commissioner of Assessing certain financial information that had been submitted during the course of securing FHA-insured mortgages. The Court of Appeals instructed the reviewing court to conduct an evidentiary hearing but also ordered the review to be carried out under the "abuse of discretion" provision, also under 5 U. S. C. § 706(2)(A), which the Court for convenience referred to as the "arbitrary and capricious" standard. *Cf. Maryland-National Capital Park & Planning Comm. v. U. S. Postal Service*, 159 U. S. App. D. C. 158, 487 F. 2d 1029 (1973).

67. The "record" here encompasses more than the materials contained in the Commission's purported official record. Internal Commission memoranda and even plaintiffs' communications to the Commission can be examined to determine if the Commission should have been aware of certain issues.

68. The affidavits submitted by the plaintiffs are essential to establish irreparable harm required before a preliminary injunction can be issued. However, the Court has not considered plaintiffs' affidavits in evaluating the propriety of the Commission's actions.

On the other hand, paragraph 29 of the Newman Affidavit cannot be considered because it constitutes the most egregious type of "post-hoc rationalization" condemned in *Burlington Truck Lines v. United States*, 371 U. S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962), and *SEC v. Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The record suggests and the Newman Affidavit clearly states that the Commission relied upon the Cull Memorandum in reaching the decision to disclose the accident data.[69] This memorandum offers the only substantially contemporaneous explanation for the decision.[70] The

69. Newman Aff'd, par. 19.

70. It should be noted that the Cull Memorandum does not discuss all legal arguments offered to the Commission in opposition to disclosure. However, in an informal administrative proceeding, it is not mandatory that the substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention. *Cf. Consumers Union of the United States v. Consumer Product Safety Commission*, 491 F. 2d 810, 812 (C. A. 2, 1974).
The picture is further clouded by the Commission's failure to comply with its representation to the manufacturers that the Secretary would make the initial determination which in turn could be appealed to the full Commission. See note 48, *supra*. Deviations from ideal procedure have been viewed as a basis for relaxing the typically close confinement to the administrative record. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971).
Denial of promised administrative appeal and the general inadequacy of the record as a factual basis for review have caused the Court to consider remanding the proceedings to the Commission. *See, e.g., Secretary of Labor v. Farino*, 490 F. 2d 885, 890-893 (C. A. 7, 1973); *Shannon v. HUD*, 436 F. 2d 809 (C. A. 3, 1970). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, conferred broad discretion without much guidance on the district courts to determine the appropriate procedures for clarifying the administrative record. *A. O. Smith, supra* at 1012. Under the circumstances—a recently formed agency engaged in an informal proceeding—it does not seem necessary to remand the matter to the Commission. The Northedge Deposition and portions of the

other purposes set forth in the Newman Affidavit are "post-hoc rationalizations" which the Court is precluded from considering as a basis for administrative decision.[71]

IV. Preliminary Injunction.

Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. *Oburn v. Shapp*, 521 F. 2d 142, 147 (C. A. 3, 1975); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F. 2d 917, 919-20 (C. A. 3, 1974); *A. O. Smith Corp. v. FTC*, 396 F. Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); *Bowers v. Columbia General Corp.*, 336 F. Supp. 609, 613 (D. Del. 1971).

A. Reasonable Probability of Eventual Success.

"It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability that it will prevail on its merits." *Oburn v. Shapp, supra*, at 148.

Congressional interest in securing manufacturers' cooperation[72] and establishing a harmonious but effective

70. (Cont'd.)
Newman Affidavit provide the Court with an adequate foundation for decision. Indeed, if these sources could not be used, it would be necessary to remand the case to the Commission with instructions to describe in detail the procedure followed in obtaining and processing the data.

71. The Court does consider these arguments when it evaluates the public interest in denying or granting preliminary injunctive relief. See IV C, *infra*.

72. *See, e.g.*, 118 Cong. Rec. 31378-79 (1972) (remarks of Representative Moss).

relationship between the manufacturers and the Commission is reflected in 15 U. S. C. § 2055(b)(1), which provides in pertinent part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act]."

Thus, before the Commission may release information to the public, a three step analysis must be satisfied. Failure to comply with any one of the standards means that disclosure would be improper.

At the outset, the Court is confronted by the Commission's oblique suggestion that § 2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U. S. C. § 552.[73] However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. *FAA v. Robertson*, 422 U. S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975). In *Robertson*, in spite of the language of the FOIA exception protecting matters *"specifically* exempted from disclosure by statute," 5 U. S. C. § 552(b)(3) (emphasis added), a statute[74] granting an agency discretion to withhold or release safety information

73. Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction, 14, n. 4 (Docket Item 35, C. A. No. 75-104). FOIA requests for the accident data have been received by the Commission. Newman Aff'd, pars. 11-14, 20.

74. 49 U. S. C. § 1504.

to the public was found to have continuing viability.[75] The Supreme Court acknowledged that "Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety." *Robertson, supra*, 422 U. S. at 267, 95 S. Ct. at 2149.

To argue that § 2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming[76] but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided.

First, the Commission is charged with the duty of taking "reasonable steps to assure," before disclosure, the accuracy of information from which the identity of the manufacturer can be readily ascertained.[77] It must be emphasized that the Commission is not a guarantor of the

75. Indeed, the problem of "repeal by implication" facing the Supreme Court in *Robertson*, 422 U. S. at 265-66, 95 S. Ct. 2140, is not present here because the FOIA (1966) was enacted before the Act (1972). The 1974 FOIA amendments, P. L. No. 93-502, did not alter the FOIA's impact in these circumstances.

76. *E.g.*, Hearings on H. R. 8110, H. R. 8157, H. R. 260 (and identical bills) and H. R. 3813 (and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972) (statement of Mr. Nader).

77. Because the manufacturers are expressly identified, it is not necessary to delineate the contours of the "readily ascertainable" standard of § 2055(b)(1). Each accident report is in a separate file that contains, inter alia, the manufacturer's name. Newman Aff'd, par. 17. The computer printout also identifies the manufacturer whose product allegedly generated that line item. Cull Memorandum, p. 2.

accuracy of the information which it releases; [78] to require the Commission to prove that its materials are accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.[79] To determine whether the Commission complied with the requirement, the Court must consider both the means selected to gather the data and the procedure employed to process the data.

The Commission strenuously argues that its method fulfilled the statutory mandate of taking reasonable steps for assuring accuracy, but it is difficult to accept this contention on review of the Commission's data-gathering activities.[80] The company that submitted only accurate re-

78. However, H. R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972) states that "the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

79. The Report of the House Committee on Interstate and Foreign Commerce suggests the underlying rationale for restricting the Commission's discretion to disclose data that it has collected.

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 [15 U. S. C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

80. The Court does *not* suggest in any way that issuing subpoenas duces tecum for all accident data—accurate or inaccurate—was improper. The Commission is the best judge of what is needed for its own internal purposes. In fact, the limitations on disclosure of 15 U. S. C. § 2055 which protect manufacturers enhance the argument for conferring broad subpoena powers on the

ports would not have complied with the requirements of the subpoena because production of all reports—verified or unverified—was ordered by the Commission. One is at a loss to understand how demanding submission of inaccurate data constitutes a reasonable step in assuring the accuracy of information which it will eventually disclose.

The Commission, however, argues that since the reports were submitted by the manufacturers, it cannot be held responsible for the accuracy of the reports. This attempt to shift responsibility for assuring accuracy fails because the duty to take reasonable steps for assuring accuracy was placed on the Commission—not the manufacturers. There is no indication that Congress sought to require manufacturers to investigate each accident report received.[81]

Furthermore, the word "information" as used in § 2055(b)(1) embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping. Ambiguities in the definition of "TV-related accident" caused some manufacturers to submit

80. (Cont'd.)
Commission. If manufacturers do not have to fear the adverse effects of inaccurate Commission releases, they will be less likely to resist efforts to obtain accident data essential for the Commission's safety standard efforts.

81. Because a manufacturer does not have a duty to investigate accident reports, the Commission's gratuitous offer to allow the manufacturers to challenge the validity of individual accident reports (Aff'd of Sheldon D. Butts, Ass't Secretary of the Commission, par. 2, Docket Item 35, C. A. No. 75-104) does not satisfy the Commission's statutorily imposed duties. The Commission also asserts that it has faithfully satisfied its statutory obligation by merely passing on without error the data submitted by the manufacturers. This argument also ignores the fact that it is the Commission which has the responsibility of striving to make its releases accurate.

only reports of fires and electrical shocks while other manufacturers submitted all accident reports. The Commission was made aware of this potential confusion before it issued its subpoenas but, apparently, refused to take any steps to ameliorate the situation. Furthermore, the Commission never sought to remedy the incomplete responses of some manufacturers to the subpoenas[82] even though the Commission had ample powers to compel compliance. 15 U. S. C. § 2076(c). Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate.[83]

On the other hand, the procedures followed by the Commission in processing the raw reports were reasonable for assuring accuracy of the information gathered. The careful initial supervision and later random checks were adequate to assure proper transfer of the data obtained to the summary sheets.[84] It appears that standard practices were followed in keypunching and obtaining the computer printout. Finally, while the manufacturers contend that not all duplicates were eliminated,[85] the duplication search

82. Evidently, varying degrees of compliance did not bother the Commission because it believed that it had obtained sufficient data to enable it to begin the process of defining safety standards. (Northedge Dep. p. 260).

83. On the other hand, the uneven quality of record-keeping among the manufacturers was beyond the control of the Commission. While the company which had the best record-keeping operation would, in effect, be punished for its efforts, no reasonable steps were open to the Commission to correct the source of misleading impressions.

84. The data processing phase is described in the text accompanying notes 24-35, *supra*.

85. *E.g.*, Affidavit of John F. Eisenmann, Manager, Consumer Technical Affairs, Aeronutronic Ford Corp., pars. 7, 10 (Docket Item 22, C. A. No. 75-116). Perhaps it is inappropriate to consider these affidavits because, as indicated at notes 64-71 and

also would seem to have been reasonable in the circumstances.

Second, before release of the TV-related accident data can be permitted, disclosure must be "fair in the circumstances." Fairness obviously is a concept that eludes precise definition. Because of the Commission's decision to subpoena unverified reports, the ambiguity of the subpoena, the failure of the Commission to seek compliance by all manufacturers and the differing quality of record-keeping, it is conceded that a comparison of the accident data to determine the relative safety of the various manufacturers' products would be improvident and misleading. However, the only caveat which the Commission proposes to release with the public disclosure relates to one source of error only—the differing qualities of record-keeping. Apparently, nothing will reflect the other sources of possible error.

Basically, the Commission proposes to release information that could unjustifiably damage [86] the manufacturers because the data does not form a reliable foundation for safety comparison—the only contemporaneous reason given by the Commission for the release of the information. Moreover, the public would be misled by the Commission's efforts. Although fairness is difficult to define, it is even more difficult to determine how dis-

85. (Cont'd.)
accompanying text *supra*, they are not part of the administrative record. It is, however, unclear when the printouts were first made available to the companies. If the printouts were not released until after the Commission had made its decision, the companies would not have had any opportunity to comment in a timely fashion to the Commission on the official record. In light of the Court's conclusion on the substantive issue raised by the affidavit, it is not necessary to decide whether the allegation is properly before the Court.

86. The potential harm to plaintiffs is discussed at IV(B) *infra*.

closure of this information would be "fair in the circumstances." [87]

Third, it must be determined whether disclosure is "reasonably related to effectuating the purposes of [the Act]." Only one reason for disclosure was set forth in the contemporaneous Cull Memorandum upon which the Commission relied in deciding to release the information: "The release of the accident data would assist consumers to better evaluate the safety of TVs." [88] One of the purposes of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U. S. C. § 2051(b)(2). Therefore, if it were possible to use this information to contrast the safety records of the various

87. The Commission in attempting to reduce this data to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports.

Furthermore, despite the Commission's contentions to the contrary (Memorandum In Support of Defendant's Motion for Summary Judgment and Opposition To Plaintiff's (sic) Motions for Preliminary Injunction, p. 15, Docket Item 35, C. A. No. 75-104), the release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair."

88. Cull Memorandum, p. 5.

The administrative record indicates that this was the only contemporaneous explanation for the Commission's decision to disclose. See notes 52-53 and accompanying text *supra*. The "post-hoc rationalizations" of the Newman Affidavit, while not appropriate for consideration here, are addressed when the preliminary injunction issue of harm to the public is reached. See IV(B) *infra*.

The memorandum also urges disclosure in response to the "overriding health and safety issues involved." The Commission obtained the accident reports by early fall of 1974 but did not decide to release them until the spring of 1975. Thus, the Commission, by its own actions, has indicated that time is not of the essence. A generalized warning of the hazards encountered while watching television would not have required identification of the manufacturers. See note 93 *infra*.

manufacturers, disclosure would be reasonably related to achieving the goals of the Act. However, it is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be "reasonably related to effectuating the purpose of [the Act]."

Accordingly, plaintiffs have convinced the Court that they have a reasonable probability of success in showing that the Commission failed to "take reasonable steps to assure" that the accident information would be accurate, that disclosure would not be "fair in the circumstances" and would not be "reasonably related to effectuating the purpose" of the Act.[89]

B. Irreparable Harm.

The plaintiffs aver, by way of verified complaint and affidavit,[90] that release of the data to the public would irreparably injure their goodwill and reputations by generating unwarranted adverse publicity. Furthermore, they contend that their competitive positions would be unfavorably affected by public disclosure of sensitive, confidential trade and commercial information.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 431 (1973). The plaintiffs' reputations

89. In light of the Court's resolution of the issues raised under 15 U. S. C. § 2055(b)(1), it is not necessary to consider the other contentions urged by the plaintiffs for preliminary injunctive relief.

90. *E.g.*, Affidavit of Fred R. Wellner, General Manager, Television Receiver Products Dept., General Electric Co., pars. 4-14 (Docket Item 11A, Ex. A-Aff., C. A. No. 75-136).

would suffer substantially from the Commission's release of misleading safety information.[91] This risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189-90 (E. D. N. Y. 1972); *Cutler-Hammer, Inc. v. Universal Relay Corp.*, 285 F. Supp. 636, 639 (S. D. N. Y. 1968).

The information which the Commission proposes to release would not normally have been made public by the plaintiffs, and it appears that the data would appropriately be deemed confidential.[92] The planned disclosures would undoubtedly harm the plaintiffs by giving their competitors access to sensitive information.

Furthermore, once the information is disseminated, the Court becomes powerless to protect or to restore the status quo pending a final determination of the merits. A preliminary injunction is especially appropriate where the action sought to be enjoined would "impair the court's ability to grant an effective remedy." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 434 (1973).

Thus, the Court finds that disclosure as proposed by the Commission would irreparably harm the plaintiffs. *See Sims v. Greene*, 161 F. 2d 87 (C. A. 3, 1947).

C. Impact on Other Interested Persons and the Public Interest.

The Court must also consider the consequences of its decision on both interested persons and the public in gen-

91. "When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous." Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1381 (1973).

92. Plaintiffs also argued that the data constituted either trade secrets or other protected confidential information. The Court did not reach these issues and uses the word "confidential" here in a more colloquial sense.

eral. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc., supra.* First, the Commission would not be significantly affected by issuance of a preliminary injunction preventing release of the accident data. The primary objective—obtaining enough data to be able to promulgate safety standards—has been achieved.

Second, in order for a preliminary injunction prohibiting disclosure to harm the public, disclosure first would have had to have been beneficial to the public. The Commission has urged that publicizing the information would assist the public in comparing the safety of various television models. However, it is clear that the data, subject to many potential sources of inaccuracy, simply cannot provide a rational basis for comparative safety shopping.

The Commission also asserts that disclosure would warn the public of hazards associated with the operation of televisions and would suggest questions to ask when purchasing a television, but these two goals could be achieved without releasing the identity of the manufacturers.

Finally, the Commission suggests that the data might be useful to other parties interested in investigating the safety of television receivers. First, the rather speculative benefit is not very significant when compared to the immediate and direct injury that would fall on the plaintiffs if the data were released to the public. Second, it is appropriate to recognize in deciding whether to grant temporary relief that the public interest in the safety investigation is being protected by an energetic and capable Commission investigation.

In sum, it is difficult to perceive how the public interest would be harmed by enjoining the disclosure of information of dubious accuracy.[93]

93. In their memoranda and at oral argument, the parties devoted little attention to the Yereance Report. See notes 36-37 and accompanying text, *supra.* Nevertheless, it appears that plaintiffs still seek to bar its release to the public (Docket Item 42, p. 3, C. A. No. 75-104).

The Yereance Report mentions the manufacturers twice. First, in parallel vertical columns the manufacturers and their respective Commission filing numbers are listed (A-7.) No accident information is revealed, and, furthermore, the filing numbers are not used elsewhere in the report. Second, the report describes the layout of the computer printout and indicates that the printout identifies the manufacturers (B-4.) The names of manufacturers who could be listed are set forth, and, of course, the plaintiffs are included. Again, no accident information is discussed in conjunction with mention of the manufacturers. Thus, while the Yereance Report is a sobering study of the physical dangers that one may encounter while watching television, the manufacturers are in no way singled out for special attention. There is nothing in the Yereance Report that relates or links accident data to a particular manufacturer.

Therefore, it appears that public dissemination of the Yereance Report would not harm the manufacturers. The absence of irreparable harm is an appropriate basis for declining to grant preliminary injunctive relief. *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture,* 469 F. 2d 1387, 1388 (C. A. 3, 1972).

Furthermore, public interest considerations militate against enjoining disclosure. The Yereance Report represents a straightforward, easy to read document that can inform the public of television hazards. Balancing the benefits of the disclosure against the minimal adverse consequences that might affect the television manufacturing industry as a whole indicates that enjoining disclosure of the Yereance Report would be improper.

Thus, the Court will not issue a preliminary injunction prohibiting disclosure of the Yereance Report.

Accordingly, the Court finds that it is appropriate to preliminarily enjoin the disclosure to the public of the accident data and the computer printout.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

An order will be entered in accordance with this opinion.

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Minute Order Termination.

A preliminary injunction was issued in the above case on October 23, 1975 and since the parties do not now know whether further action is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes, therefore it is

ORDERED

1. The Clerk is hereby instructed to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes.

2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Dated: August 20, 1976.

/s/ JAMES L. LATCHUM
Chief Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 15, 1977

Memorandum Opinion.

LATCHUM, *Chief Judge.*

The plaintiffs in these twelve actions [1] are manufacturers of television receivers who seek to permanently enjoin the Consumer Product Safety Commission ("Commission"), its members and officers from releasing to the public certain television-related accident data which the plaintiffs contend is privileged, confidential, misleading and inaccurate. The accident data had been furnished to the Commission after it publicly requested and later issued subpoenas duces tecum pursuant to its authority under 15 U. S. C. § 2076(b)(3). However, this Court on October 23, 1975, after a hotly contested battle exemplified by the extensive briefs filed and oral arguments presented, entered a preliminary injunction enjoining the Commission's public release of the contested data pending a final hearing on the merits of the plaintiffs' conten-

1. There were thirteen separate actions, but one suit, Teledyne Mid-America Corp. v. Consumer Product Safety Commission, C. A. No. 75-122, was voluntarily dismissed. Docket Item 63 in C. A. No. 75-122.

tion. GTE Sylvania, Inc. v Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). The Commission's notice of appeal filed on December 12, 1975, with the Third Circuit was voluntarily dismissed on May 10, 1976, after the Solicitor General evidently concluded that it was unlikely under the circumstances that the Third Circuit could be persuaded to reverse this Court's decision to preliminarily enjoin disclosure. During the ensuing two years, the parties informally suspended activity in these actions apparently awaiting the final determination of a related issue in cases then pending in the District Court for the District of Columbia [2] and in the Western District of New York.[3] In July, 1977, the plaintiffs filed motions to make permanent the preliminary injunction.[4] The Commission responded by filing motions to vacate the preliminary injunction [5] and for summary judgment [6] and by moving to transfer these cases to the District Court for the District of Columbia pursuant to 28 U. S. C. § 1404 (a).[7] This opinion addresses only the question of the propriety of a transfer of these actions.

The federal transfer statute provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404(a).

2. Consumers Union of the United States v. Consumer Product Safety Commission, C. A. No. 75-705 (D. D. C.).

3. Pierce & Stevence Chemical Corp. v. Consumer Product Safety Commission, C. A. No. 1975-410 (W. D. N. Y.).

4. Docket Item 51 in C. A. No. 75-104.

5. Docket Item 79 in C. A. No. 75-104.

6. Docket Item 80 in C. A. No. 75-104.

7. Docket Item 55 in C. A. No. 75-104.

In order to secure a change of venue the burden is upon the moving party to show that the action might have been brought in the District of Columbia and that the interest of justice and the convenience of the parties and witnesses require the transfer of these actions to the transferee district.[8]

There is no dispute that the plaintiffs had the right to initially bring these actions in the District of Columbia. The district court there would have personal jurisdiction over the Commission because it resides in the District of Columbia and because the "wrongful" conduct as alleged in the complaint occurred there; for the same reason, venue would be appropriate under 28 U. S. C. § 1391 (e)(1) or (2) which allows a civil action against an agency of the United States to be brought in the judicial district in which the agency resides or in which the cause of action arose. Thus the Court has the *power* to transfer.

Turning now to the criteria for transfer, the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia. With commendable candor it conceded at oral argument that the convenience factor is in equipoise; a trial of these actions in this forum would be just as convenient for the parties and witnesses as trial in the District of Columbia.

Whether the transfer here sought is warranted under § 1404(a) must therefore be judged by the remaining statutory criteria of whether it is in the interest of justice. The Commission points to the fact that the Consumers Union of the United States, Inc. and Public Citizen's Health Research Group ("FOIA requesters") on May 5, 1975, after the original cases had been filed in this district,

8. Shutte v. Armco Steel Corp., 431 F. 2d 22 (C. A. 3, 1970), *cert. denied*, 410 U. S. 910 (1971).

brought an action [9] ("D. C. case") under the Freedom of Information Act ("FOIA") in the District Court for the District of Columbia against the Commission and twelve of the manufacturers who are plaintiffs in these actions seeking access to the same television accident reports which are the subject matter of this litigation. The D. C. case was dismissed on September 12, 1975. Consumers Union of the United States, Inc. v. Consumers Product Safety Commission, 400 F. Supp. 848 (D. D. C. 1975). In that case the District Court found that there was no "case or controversy" between the plaintiff and the Commission and that the complaint failed to state a claim against the television manufacturers upon which relief could be granted. Almost two years later, on July 5, 1977, the D. C. Court of Appeals reversed the District Court finding that there was a "case or controversy" between the FOIA requesters and the Commission because (1) there was disagreement between the parties as to the scope and effect of the Delaware proceedings, and (2) that the Delaware action had been dismissed in fact and had been dropped by the acquiescence of the parties. Consumers Union et al. v. Consumers Product Safety Commission, No. 75-2059 (Slip opinion D. C. Cir., decided July 5, 1977). Upon rehearing the D. C. Circuit Court, noting its erroneous assumption in its July 5, 1977, opinion that the Delaware cases had in fact been dismissed or dropped, nevertheless adhered to its prior decision that a case or controversy exists between the FOIA requesters and the Commission for the reason the Commission continues to refuse to produce the documents because of the preliminary injunction outstanding in this litigation. Consumers Union et al. v.

9. The FOIA requesters, although aware of the earlier filed Delaware cases, did not seek to intervene in the instant cases but for "strategic reasons" filed the D. C. suit instead. This Court, although aware of the FOIA requesters, was without power to bring them into the Delaware litigation involuntarily.

Consumers Product Safety Commission, No. 75-2509 (Slip opinion decided Aug. 25, 1977).

The Commission now argues from the history of the D. C. litigation that the Delaware and District of Columbia actions "have arrived at the same stage and are ready for a full hearing" and that a transfer from Delaware (1) would avoid the possibility of inconsistent results on the merits, (2) would bring all parties including the FOIA requesters, who have interests of disclosure and non-disclosure, together in one forum, and (3) would eliminate difficulties of the Commission in conducting pretrial discovery and duplicate trials in two fora.

First, the Court finds that the Commission has failed to meet its burden of showing that the D. C. case, which was later filed, is in about the same stage and posture as this litigation. In the present suits both parties have moved for summary judgment with accompanying main briefs, discovery has been practically completed, and following the determination of this transfer motion, briefing can be quickly completed and oral argument promptly held. More importantly, a voluminous record relating to the merits of this case is already before the Court having been filed in preparation of the hearings on the motions for a preliminary injunction which has since been supplemented by recent discovery procedures. In contrast, nothing towards the disposition of the merits has been accomplished in the D. C. litigation. The most recent development there is that the Court of Appeals on September 9, 1977, stayed its mandate until October 4, 1977, in order to give the television manufacturers an opportunity to petition for a Writ of Certiorari to the United States Supreme Court. Moreover, this Court has been advised that several of the television manufacturers have filed motions to dismiss on jurisdictional grounds which must be

first determined by the D. C. District Court before reaching the merits even if Certiorari is denied.[10] Thus, the present record clearly shows that this first filed litigation is much farther advanced towards final disposition of the merits than is the later filed D. C. litigation. These two factors distinguish this litigation from the situations in Jacobs v. Tenney, 316 F. Supp. 151, 167-171 (D. Del. 1970) and Hall v. Kittay, 395 F. Supp. 261 (D. Del. 1975). After comparing the posture of the litigation here with that in the D. C. Court, it is obvious that granting a transfer from Delaware would unduly delay a determination of the merits. After all, if the Commission is successful here on their present summary judgment motion or after trial if one is necessary, there would be no need to pursue the D. C. litigation since the Commission has stated that it is ready to disclose the accident reports.

The fact that the Commission will be required to proceed in two fora which may result in inconsistent orders on the merits is not an uncommon possibility, particularly when an action may not be transferred to another district in which similar litigation is pending because the action could not have been originally brought there. *See* Phillips Petroleum Company v. Federal Energy Administration, — F. Supp. — (D. Del. 1977) (slip opinion June 27, 1977). That possibility as well as duplicate trials, however, could be easily avoided now if the interested FOIA requesters, who instituted this D. C. action after the first cases were brought here, would voluntarily intervene in this litigation. What the Commission overlooks by their argument of inconsistent results and duplicate trials is that this possibility existed from the time the later D. C. suit was filed until the D. C. District Court dismissed that suit on September 12, 1975. The time for the Commission to have moved

10. Warwick Electronics, Inc. has moved in District of Columbia Court to dismiss for lack of jurisdiction because it did no business in the district.

for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here.

Furthermore, five of the plaintiffs here initially filed their actions in the district courts of New York[11] and Pennsylvania,[12] but all consented, at the urging of counsel for the Commission, to have their actions transferred and heard in this forum. The Commission expressly stipulated that this district was the "appropriate forum" even though a comparable law suit was then pending in the District of Columbia.

For this reason also the Court is not inclined, especially at this late date and after one transfer of five cases, to relieve the Commission of whatever additional burden it must bear as a result of past legal oversights. Furthermore, the Court does not believe that the burden is as onerous as the Commission implies. As previously noted, most of the discovery has been completed with respect to the primary legal issue raised in these actions; duplicative discovery can be further avoided merely by stipulations that discovery taken in connection with these actions can be used in the District of Columbia and by coordinating any discovery that remains to be taken.[13] Since the legal

11. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049) and Toshiba (C. A. No. 75-2050) filed actions in the Southern District of New York and General Electric (75-CV-189) filed suit in the Northern District of New York.

12. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

13. This likewise answers the Commission's suggestion that unless a transfer is granted there exists a threat of inconsistent discovery orders issuing from this district and the District of Columbia court. Moreover, it is represented to the Court that little or no discovery has been taken in the District of Columbia litigation. If that representation is accurate, the threat of inconsistent discovery orders is even more illusory since, as already noted, most of the requisite discovery has already been taken in connection with the actions pending here.

issues are substantially the same, briefs and/or affidavits are likely to be similar and the only additional costs to the Commission will be filing papers in that district and sending an attorney to argue motions.

Finally, although the Court is not unmindful of the societal interest in preserving limited judicial resources, it is not so clear that judicial economy will necessarily follow from a transfer of these actions. Having carefully considered the factual and legal contentions which were set forth in the briefs and affidavits submitted by the parties and at the hearing on the preliminary injunction, this Court is familiar with the legal issues raised in the pending cross motions for summary judgment which soon will be ripe for final decision. Economy of judicial effort, in terms of the efficient resolution of both the overriding private concerns of the litigants and the interests of the general public, may well be best served by an orderly and expeditious disposition of the actions pending in this district.

While recognizing the possibility of inconsistent orders from different courts is a legitimate consideration under § 1404(a), the present posture of these actions together with the policy favoring the prompt adjudication of disputes—particularly those which bear importantly upon substantial interests of the public—convinces this Court that the administration of justice will be advanced by denying the motion to transfer.[14] As the Court earlier noted, most of the discovery connected with this litigation has been, or soon will be, completed, the parties have filed appropriate cross-motions for summary judgment with at least some of the requisite supporting briefs and affidavits,

14. *Cf.* Campbell v. Mitsubishi Aircraft International, Inc., 416 F. Supp. 1225 (W. D. Pa. 1976); Penn v. Goldman Sachs & Co., 397 F. Supp. 392 (S. D. N. Y. 1975); Nagle v. Pennsylvania R. R. Co., 89 F. Supp. 822 (N. D. Ohio 1950).

and the Court is prepared to deal expeditiously with the issues raised therein. Viewed from this perspective, the interest of justice is better served by a prompt resolution of dispositive legal issues raised in the motions or, if necessary, upon a trial on the merits. In short, the Court concludes that the Commission has failed to demonstrate that the convenience of the parties and witnesses, in the interest of justice, warrants a transfer of these actions to the District of Columbia.

An order will be entered denying the Commission's motion to transfer and will fix a schedule for the completion of briefing on the cross-motions for summary judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

December 8, 1977

Opinion.

LATCHUM, *Chief Judge.*

On October 23, 1975, this Court made extensive findings of fact and conclusions of law when it granted plaintiffs'[1] motions to enjoin preliminarily the Consumer Product Safety Commission (the "Commission") from disclosing certain "TV-related accident data" submitted by the plaintiffs and a computer printout summarizing that data to the public in response to a request made under the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552. GTE Sylvania Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). Because the prior opinion sets forth the factual background of this litigation in great detail, it will not be rehearsed here.

1. Originally there were thirteen separate actions brought by as many television manufacturers which were consolidated for consideration of plaintiffs' motions for a preliminary injunction. Since the Court's opinion of October 23, 1975, the suit brought by Teledyne Mid-America Corp., C. A. No. 75-122, has been dismissed by stipulation of the parties. Docket Item 63 (all docket item references are to C. A. No. 75-104).

The Court based its decision to grant a preliminary injunction on the Commission's failure to comply with Section 6(b)(1) of the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2055(b)(1). Section 6(b)(1) provides in pertinent part:

> The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act].

The Court found on the uncontested facts that the Commission had wholly failed to take reasonable steps to assure that any of the three prerequisites for public disclosure of the TV-related accident data were met. 404 F. Supp. at 370-73.

The consolidated cases are presently before the Court (1) on plaintiffs' motion for summary judgment to make the preliminary injunction permanent[2] and (2) on the Commission's motions to vacate the outstanding preliminary injunction and for summary judgment.[3]

Despite the two-year passage of time, the undisputed facts upon which the Court based its earlier decision have not changed. Thus, the Court need not reconsider any of its earlier findings and conclusions in order to take account of any intervening changes in the *factual* situation. However, the Commission does contend that there have been intervening *changes of law* which should prompt this Court to reconsider its previous decision. To these arguments we now turn.

2. Docket Item 86.
3. Docket Items 79 & 80.

I. Commission's Interpretation of Section 6(b)

First, in opposing the plaintiffs' motions for a preliminary injunction, the Commission suggested that Section 6(b)(1) applies only to affirmative disclosures initiated by the agency, such as press releases and publications, and not to disclosures made in response to FOIA requests.[4] The Court rejected such an interpretation of Section 6(b) because it contravened the legislative history of the section.[5] Nevertheless, the Commission has renewed the argument, contending that two developments since the Court's previous decision support the Commission's position. The developments are: (1) the Commission formally endorsed the interpretation of Section 6(b)(1) which limits the section's applicability to "affirmative" disclosures initiated by the agency,[6] and (2) Congress, in explaining a 1976 amendment to Section 29 of the Act (15 U. S. C. § 2078), used language which arguably indicates acceptance of the Commission's interpretation. After considering both these developments, however, the Court remains convinced that Congress did not intend to make Section 6(b) inapplicable in the face of an FOIA request.

4. *See* Docket Item 35, p. 14, n. 4.

5. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 369-70.

6. The Commission recorded its interpretation of Section 6(b) as a "minute" of an executive session held on October 6, 1975 (Docket Item 80, Ex. C). Although that interpretation preceded the decision on the preliminary injunction motion by a few weeks, the Commission did not inform the Court of it at that time. In addition, the Commission recently published proposed procedures for complying with Section 6(b). 42 Fed. Reg. 54,304 (1977) (to be codified in 16 C. F. R. Part 1013). In the prefatory comments, the Commission reiterated its view that Section 6(b) applies only when it "actively and publicly discloses information." *Id.*

The Commission, relying on three Supreme Court cases,[7] contends that its interpretation of Section 6(b) deserves great weight in this Court. Although the cases cited establish the principle that on matters of statutory construction a court should give deference "to the interpretation given the statute by the officers or agency charged with its administration," [8] they do not justify the application of that principle in this case. Two of them, Zemel v. Rusk, 381 U. S. 1, 11-12 (1965) and Udall v. Tallman, 380 U. S. 1, 16-18 (1965), involved long-established administrative interpretations which the respective agencies had applied consistently and frequently.[9] In sharp contrast, the interpretation being advanced by the Commission here did not arise until after the present controversy began. The third case cited by the Commission, E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977), is also distinguishable. There, the Supreme Court held that the Fourth Circuit erred in substituting its judgment for that of the Securities Exchange Commission ("SEC") as to the appropriate method

7. E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977); Zemel v. Rusk, 381 U. S. 1, 11 (1965); Udall v. Tallman, 380 U. S. 1, 16 (1965).

8. Udall v. Tallman, *supra*, 380 U. S. at 16.

9. In both cases, Congress knew about the administrative interpretations of the statutes in question but had not amended those statutes. The Court viewed such Congressional inaction as indicating approval of the agency's position. Zemel v. Rusk, *supra*, 381 U. S. at 11; Udall v. Tallman, *supra*, 380 U. S. at 17-18. It is noteworthy that since this Court rejected the Commission's interpretation in its prior decision, Congress has not amended Section 6(b), although that decision has been brought to Congress' attention and other sections of the Consumer Product Safety Act have been amended. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503; for instances where representatives of the Commission discussed this Court's prior decision before Congressional committees, *see* Docket Item 112, p. 24-25.

for determining value in a merger involving a closed end investment company. The Court noted that the SEC had "long recognized" the method it used, and that it was, "as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry." *Id.* at —, 97 S. Ct. at 2234. This case, on the other hand, presents a narrow legal issue which is readily susceptible to judicial resolution and requires no special expertise of the Commission. In sum, because none of the factors which warrant deference to an agency's position exist in this case, the Court will accord no special weight to the Commission's interpretation of Section 6(b)(1).

The second development which the Commission contends supports its interpretation of Section 6(b)(1) is a a statement in the legislative history of a 1976 amendment to Section 29 of the Act.[10] Section 29, 15 U. S. C. § 2078, concerns cooperation between the Commission and other federal and state agencies. The 1976 amendment authorizes the Commission to provide nonconfidential portions of accident and investigation reports to such agencies. 15 U. S. C. § 2078(e). The amendment further provides:

> No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b) of the Act]. *Id.*

10. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 15, 90 Stat. 510 (amending 15 U. S. C. § 2078 (Supp. III 1973)).

The explanation of the amendment to Section 29 contained in the Conference Report includes the following statement:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees *to supersede or conflict with* the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the [FOIA].

H. R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U. S. Code Cong. & Ad. News 1029 (emphasis supplied).

Although the statement of the Conference Committee appears consistent with the interpretation espoused by the Commission, it does not present a reliable basis for inferring that four years earlier, when Section 6(b) was enacted, Congress intended to make it inapplicable to disclosures made in response to FOIA requests. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U. S. 304, 313 (1960), *quoted in* United States v. Philadelphia National Bank, 374 U. S. 321, 348-49 (1963). Similarly, the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew[11] of the prior decision in this case, in which the Court stated:

11. *See* note 9 *supra*.

> "To argue that [Section 6(b)(1)] becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 1370 (footnote omitted).

Finally, by stating that they did not intend the Section 29 requirement of compliance with Section 6(b) "to supersede or conflict with the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6))," the conferees emphasized the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA. Notably, the statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do.

The provisions of the FOIA cited by the conferees [12] impose a duty on federal agencies to respond within ten days in most cases, and promptly in any event, to FOIA requests. Section 6(b)(1) provides that at least thirty

12. Subsection (a)(3) of 5 U. S. C. § 552 provides that each agency, upon request, shall make reasonably described records "promptly available" to the requester. Subsection (a)(6) requires an agency to determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether to comply with the request and provides for a ten-day extension of that time limit in "unusual circumstances." Subsection (a)(6) further provides that a requester shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the prescribed time limits. 5 U. S. C. § 552(a)(6)(C).

days prior to disclosing information from which the identity of a manufacturer can be readily ascertained the Commission must, "to the extent practicable, notify" such manufacturer and provide him "with a reasonable opportunity to submit comments to the Commission in regard to such information." 15 U. S. C. § 2055(b)(1). The Commission contends than an "impermissible conflict" exists between the thirty-day notice requirement of Section 6(b) and the ten-day time limit for responses under the FOIA.[13] The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an agency make records "promptly available" to any person requesting them.[14] The ten-day requirement was not introduced until 1974, when Congress amended the FOIA.[15] Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. Indeed, such an interpretation completely ignores the legislative history of Section 6(b). *See* Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. — (W. D. N. Y., *filed* October 26, 1977) (C. A. No. 75-410) (slip op.)

The Court concludes, therefore, that Section 6(b) applies to all disclosures which are not exempted from compliance by Section 6(b)(2), 15 U. S. C. § 2055 (b)(2),[16] and the Commission should attempt to accom-

13. Docket Item 81, pp. 17-19.

14. Pub. L. No. 90-23, 81 Stat. 54 (1967) (current version at 5 U. S. C. § 552(a)(6)).

15. Pub. L. No. 93-502, § 1(c), 88 Stat. 1562 (1974) (codified at 5 U. S. C. § 552(a)(6)).

16. The Commission contends that if Section 6(b)(1) applies in this case, it also must apply to thousands of other records, such

modate the time periods of both statutes to the fullest extent practicable.[17]

II. Amendment to FOIA Exemption 3

Next, the Commission argues that the Court should reconsider and reverse its prior holding that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), because Congress amended that exemption in 1976 with the express intent of overruling the Supreme Court's ruling in

16. (Cont'd.)
as consumer complaints and petitions for rulemaking under Section 10 of the Act, 15 U. S. C. § 2059, which are regularly requested under the FOIA. Docket Item 81, pp. 18-19. The Court expresses no opinion on this proposition, except to note, without deciding, that petitions for rulemaking under Section 10 arguably are exempt from the requirements of Section 6(b)(1) as information concerning an administrative proceeding within the meaning of Section 6(b)(2)(B).

17. *Cf.* Chrysler Corp. v. Schlesinger, — F. 2d —, 14 E. P. D. ¶ 7868, at 6312 (C. A. 3, 1977). In the *Chrysler* case, a government agency notified Chrysler that it had received a request under the FOIA for certain documents concerning one of Chrysler's plants. The agency's regulations permitted a contractor to challenge a decision to disclose such information and guaranteed a final decision within thirty days from the date the challenge was filed. *Id.* at —, 14 E. P. D. ¶ 7868, at 6304-05, 6314 n. 27. Due to the ten-day response time prescribed by the FOIA, the agency, upon deciding to release the information, informed Chrysler that it could not await the results of an administrative appeal and would release the information five working days later. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6305. Chrysler filed suit in a district court to enjoin the disclosure and the Third Circuit held the case was ripe for judicial review despite Chrysler's failure to exhaust its administrative appeal remedy. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6312. Contrary to the Commission's contention (Docket Item 111, p. 5), the Court in *Chrysler* did not "reject[ ] agency proceedings which would conflict with the mandate of the FOIA time requirements"; rather, the court resolved the conflict in a manner calculated to give effect to the purposes of both the FOIA and the administrative review procedures.

FAA v. Robertson, 422 U. S. 255 (1975), upon which this Court relied in reaching its previous decision. Although the change in the law clearly necessitates reconsideration of the issue, the Court cannot agree with the defendants' position that Exemption 3, as amended, does not exempt material withheld pursuant to Section 6(b)(1).

Originally, Exemption 3 of the FOIA provided:

> (b) This section does not apply to matters that are—
>
> • • •
>
> (3) specifically exempted from disclosure by statute.

5 U. S. C. § 522(b)(3) (1970) (amended 1976). Congress amended this exemption in 1976 to exclude from the mandatory disclosure provisions of the FOIA, matters that are

> (3) specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[18]

The Conference Committee, which was responsible for the language of the amendment as finally enacted, explained the purpose of the amendment as follows:

> The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA*

18. Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). The amendment passed as a rider to the Government in the Sunshine Act. Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum. L. Rev. 1029, 1041 n. 70 (1976).

> *v. Robertson,* 422 U. S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U. S. C. 1306).[19]

The thrust of the defendants' argument is that Section 6 (b)(1) is indistinguishable from the statute involved in *FAA v. Robertson, supra.* Because Congress expressed a clear intent to exclude Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504) from Exemption 3, the Commission contends that Section 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. § 2055(b)(1)) must be excluded from the exemption as well.

Section 1104 authorizes the Administrator, upon receipt of a written objection, to withhold information from public disclosure if, in his judgment, disclosure "would adversely affect the interests of [the objecting party] and is not required in the interest of the public." 49 U. S. C. § 1504. By holding that information withheld pursuant to Section 1104 constituted matter "specifically exempted from disclosure by statute" within the meaning of the original Exemption 3, the Supreme Court in *FAA v. Robertson, supra,* made it possible for government officials to avoid the mandatory disclosure provisions of the FOIA on general discretionary grounds such as "in the public interest." Congress reacted by amending Exemption 3 to

19. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). The intent to undo *FAA v. Robertson, supra,* was also evident earlier in the legislative process. *See* H. R. Rep. No. 880, Part I, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2191-92; Note, *supra* note 18, 76 Colum. L. Rev. at 1042-44.

prevent agencies from avoiding disclosure on such nebulous grounds.[20]

After comparing the two statutes, the Court concludes that Section 6(b)(1) does not afford the Commission the same broad discretion to withhold information that Section 1104 gives to the Administrator of the FAA. Section 6 (b)(1) requires the Commission, as a prerequisite to disclosing "information from which the identity of [a] manufacturer or private labeler may be readily ascertained," to "take reasonable steps to assure": (1) that the information is "accurate," (2) that the disclosure is "fair in the circumstances," and (3) that the disclosure is "reasonably related to effectuating the purposes of [the Act]." 15 U. S. C. § 2055(b)(1). The requirement of accuracy most clearly distinguishes Section 6(b)(1) from Section 1104 of the Federal Aviation Act, because "accuracy" is a more definite and objective standard than the "interest of the public." Similarly, the Court considers the fairness criteria in Section 6(b)(1) more susceptible to effective judicial review than the public interest standard of Section 1104.[21]

Having found Section 6(b)(1) distinguishable from the statutes [22] which Congress specifically stated would not

20. *See* Seymour v. Barabba, 559 F. 2d 806, 807 (C. A. D. C. 1977).

21. *See* Note, *supra* note 18, 76 Colum. L. Rev. at 1045 & n. 100.

22. Besides Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504), the Conference Report also identified Section 1106 of the Social Security Act (42 U. S. C. § 1306) as a statute whose terms do not bring it within Exemption 3. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). Section 1106 of the Social Security Act prohibits disclosure of a wide range of social security information, except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe." 42 U. S. C. § 1306(a). Thus, Section 1306 vests virtually "unfettered and unguided power" in the Secretary to determine what information to disclose. Stretch v. Weinberger, 495 F. 2d 639, 640 (C. A. 3, 1974). As indicated above, the Commission's discretion under Section 6(b)(1) is much more circumscribed.

be covered by Exemption 3, we now turn to the language of the exemption itself to determine whether Section 6 (b)(1) falls within its ambit. The two provisos of Exemption 3 are in the disjunctive. Subpart A exempts from the FOIA matters that are "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." Because Section 6(b)(1) affords the Commission some discretion in determining whether to withhold material from the public, it is not the type of mandatory nondisclosure statute described in subpart A of Exemption 3. *See* Irons v. Gottschalk, 548 F. 2d 992, 994 n. 3 (C. A. D. C. 1976), *petition for cert. filed,* 46 U. S. L. W. 3055 (August 18, 1976) (No. 77-203). Subpart B exempts matters authorized to be withheld pursuant to one of two distinct types of statutes: (1) those which establish "particular criteria for withholding" and (2) those which "refer[ ] to particular types of matters to be withheld." 5 U. S. C. § 552(b)(3); *see* Kruh v. General Services Administration, 421 F. Supp. 965, 967 n. 4 (E. D. N. Y. 1976). The plaintiffs argue that Section 6(b)(1) satisfies both the standards contained in subpart B of Exemption 3. However, because the Court agrees that Section 6(b)(1) establishes particular criteria for withholding, it is unnecessary to decide whether the statute also refers to particular matters to be withheld.

The only guidance which Congress provided concerning the contours of the exemption for statutes establishing particular criteria for withholding is that it does not extend to statutes like the one at issue in *FAA v. Robertson, supra.* The few cases decided since the amendment became effective in March of 1977 have not shed much more light on

the matter.[23] It is noteworthy, however, that the only commentator to address the issue has concluded that Section 6(b)(1) would fall within the amended Exemption 3, under the "particular criteria for withholding" rubric. Note, *supra* note 18, 76 Colum. L. Rev. at 1045 n. 100. The legislative histories of Section 6(b)(1) and Exemption 3 support the same conclusion. As the Court stated in its prior decision in this case, Section 6(b)(1) reflects the balance struck between the Commission's need to have complete access to information relevant to its statutory responsibilities and Congress' "concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra,* 404 F. Supp. 352, 370 & n. 79. Due to the sensitive nature of much of the information the Consumer Product Safety Act authorized the Commission to gather, the House Committee on Interstate and Foreign Commerce reported that it had

> written into section 6 [15 U. S. C. § 2055] of the bill *detailed requirements and limitations relating to the*

23. In a case strikingly similar to this one, a district court judge held that Section 6(b)(1) of the Act "is a statute setting forth particular criteria for withholding information" and, therefore, falls within the ambit of FOIA Exemption 3. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. —, — (W. D. N. Y., decided October 26, 1977) (C. A. No. 75-410) (slip op. at 8). In that case, however, the court relied on *FAA v. Administrator, supra* and this Court's prior decision without discussing the legislative history of the amendment to Exemption 3 and its effect on the continuing validity of those two precedents.

Two other cases decided after the amendment to Exemption 3 became effective concerned Subpart A and the "particular types of matter" standard of Subpart B of the exemption, respectively. *See* Seymour v. Barabba, 559 F. 2d 806 (C. A. D. C. 1977); Founding Church of Scientology v. National Security Agency, 434 F. Supp. 632 (D. D. C. 1977).

> *Commission's authority to disclose information* which it acquires in the conduct of its responsibilities under this Act.

H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972) (emphasis supplied). As the emphasized language makes clear, Congress intended Section 6(b)(1) to limit the discretion of the Commission to disclose information submitted to it.

A review of the legislative history of the original version of Exemption 3 led the Third Circuit "to a firm conviction that the absence of [legislatively prescribed] standards to govern broad agency discretion was the chief evil at which Congress aimed." Stretch v. Weinberger, 495 F. 2d 639, 640-41 & n. 5 (C. A. 3, 1974). Nothing in the legislative history of the amendment to Exemption 3 suggests that the intent of Congress has changed.[24] Rather, the amendment overruled *FAA v. Robertson, supra,* in which the Supreme Court, according to Congress, had "misconceive[d] the intent of Exemption 3" by interpreting it to include a statute which granted an agency almost unlimited discretion to withhold documents. *See* H. R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2205; Seymour v. Barabba, *supra,* 559 F. 2d at 807. Congress did not exclude from the amended Exemption 3 all statutes which give an agency some discretion concerning whether to disclose certain information. Therefore, the Court concludes that Section 6(b)(1), which requires the Commission to

24. *See generally* Note, *supra* note 18, 76 Colum. L. Rev. at 1041-43. The author concluded that Congress intended to limit the exemption to statutes in which the concern for secrecy emanated from Congress rather than the agency. *Id.* He would assess the particularity of the criteria for withholding information according to their amenability to *de novo* judicial review, as provided for by the FOIA. *Id.* at 1045.

take reasonable steps to assure accuracy, fairness and a statutory purpose before disclosing information which identifies a manufacturer, establishes particular criteria for withholding and falls within Exemption 3 of the FOIA, as amended.

III. Third Circuit's Decision in Chrysler v. Schlesinger.

The final legal development which the Commission contends should lead this Court to modify the findings and conclusions made in conjunction with the issuance of the preliminary injunction is the decision of the Third Circuit in Chrysler Corp. v. Schlesinger, — F. 2d —, 14 Empl. Prac. Dec. ¶ 7868 (C. A. 3, 1977). In *Chrysler* the court held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," citing with approval the prior decision in this case. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, 6318 n. 88.[25] In addition to recognizing a reverse FOIA cause of action, the Third Circuit suggested that in such cases the courts employ the following analytical approach in reviewing an agency's decision to disclose:

> First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has con-

25. In light of *Chrysler Corp. v. Schlesinger, supra,* the Commission has abandoned its argument that this Court lacks jurisdiction to review the decision to release the records at issue here. Docket Item 118, p. 5.

> cluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. * * * Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.

Id. at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311-12 (footnote omitted).

In the case *sub judice*, the Commission concluded that the contested information did not fall within any FOIA exemption. Having already decided that, by virtue of Section 6(b)(1) of the Act, Exemption 3 applies to the accident data the Commission intends to disclose, the Court will bypass the first of the suggested inquiries—"whether any non-disclosure statute or non-disclosure regulation is applicable." [26] Instead, the Court turns to the Commission's alternative argument that, even if Exemption 3 applies, the Commission has complied with the requirements of Section 6(b)(1).

26. At oral argument, the plaintiffs argued that Sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. §§ 2055(a)(2) and (b)(1)) and 18 U. S. C. § 1905, which is incorporated in Section 6(a)(2), are "non-disclosure statutes" as that phrase was used in the *Chrysler* opinion. (Transcript ("T. —") 17-19). The Commission disputed the characterization of Section 6(b)(1) as a "non-disclosure statute" and argued that the plaintiffs have not shown that the contested information is protected from disclosure by Section 6(a)(2) and 18 U. S. C. § 1905. (T. 30-31, 38-39). The Court expresses no opinion on these issues.

The decision to grant the plaintiffs' motions for a preliminary injunction was based on the finding that the Commission had not satisfied its duty under Section 6(b)(1) to take reasonable steps to assure (1) that the accident data is "accurate," (2) that disclosure would be "fair in the circumstances," and (3) that disclosure would be "reasonably related to effectuating the purposes of [the Act]." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 370-373. The Court expressly held that the Commission's proposals (1) to release the accident data with a statement pointing out the differing qualities of recordkeeping among the manufacturers and (2) to correct any inaccuracies identified by the manufacturers were insufficient to satisfy the affirmative duties imposed by Section 6(b)(1). *Id.* at 371-72 & n. 81. Nevertheless, the Commission now argues that these steps, together with an offer to release with the data "statements prepared by the manufacturers describing how their subpoenaed data should be viewed," constitute compliance with the three criteria for disclosure.[27] Not wishing to repeat the analysis in its prior opinion, the Court notes only that the inclusion of such statements by the manufacturers will not facilitate meaningful comparisons of the accident data to determine the relative safety of the various manufacturers' products. Much of the data will remain unverified. The inaccuracies and unfairness introduced by the Commission's failure to clarify ambiguities in the definition of "TV-related accident" in the subpoenas and to seek full compliance with its subpoenas will persist. In

27. Docket Item 81, p. 35. In Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, *supra*, — F. Supp. at — (slip op. at 4 n. 3), the court concluded that the inclusion of a statement by the manufacturer asserting its viewpoint would not dispel the possibility of irreparable harm from disclosure of information like that at issue here.

short, the Commission still has failed to demonstrate that disclosure is reasonably related to effectuating the purposes of the Act.[28] Accordingly, the Court finds that the Commission has not fulfilled its responsibilities under Section 6(b)(1).

The last step in the analytical framework set forth in Chrysler Corp. v. Schlesinger, *supra*, requires a remand to the agency, "if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the . . . analysis." Seizing upon this language, the Commission argues that a remand is appropriate here, because "the record is unclear, as to whether or not 6-b(1) was considered" in processing the request for the accident reports.[29] The Court disagrees. As noted in the prior opinion,[30] the administrative records in this case supplemented by the affidavit of Constance B. Newman,[31] Vice Chairman of the Commission, and the deposition of Robert L. Northedge,[32] who was the project director of the Com-

28. The fact that the accident data could be compared profitably on the basis of the presence or absence of safety features or on the basis of type, such as black and white televisions versus color televisions, is irrelevant. The Commission could accomplish that purpose without identifying the manufacturers.

29. T. 30; Docket Item 118, p. 7.

30. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 368-69 & n. 70.

31. Docket Item 27 (C. A. No. 75-112).

32. Based on the holding in Chrysler Corp. v. Schlesinger, *supra*, — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, that judicial review in reverse FOIA cases should be limited to the administrative record and should not involve a trial *de novo*, the Commission now contends that Court should not consider portions of the Northedge deposition. (T. 43). The argument is without merit. This Court's determinations in the prior opinion concerning the scope of judicial review and the materials to be reviewed comport completely with the principles expressed in the *Chrysler* case. Relying on Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402, 420 (1971), and Camp v. Pitts, 411 U. S. 138, 142-43 (1973), the Court decided to supplement the administrative record with the Newman affidavit and Northedge deposition in order to understand the basis for the Commission's decision to disclose the accident data. GTE Sylvania Inc. v. Consumer Products Safety Commission, *supra*, 404 F. Supp. at 367-68. The Third Circuit explicitly recognized the propriety of such a procedure in the *Chrysler* opinion. — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6318 n. 96.

Mr. Northedge occupied a position of responsibility with respect to gathering and processing of the TV-related accident data. The Commission itself produced him as the person best able to explain the data gathering process. The Court concludes, therefore, that there is no reason to exclude the Northedge deposition. Moreover, the opinions expressed by Mr. Northedge concerning the misleading nature of the information and the absence of any use for it are merely cumulative, and do not form the basis for the Court's decision.

mission's investigation of television hazards, provides this Court with an adequate foundation for effective review. Moreover, the Court foresees no benefit which possibly could flow from a remand in the circumstances of this case.

Conclusion

In conclusion, the Commission has presented no new facts which warrant modification of the findings of fact and conclusions of law made in conjunction with the issuance of the preliminary injunction. The Commission has referred to several changes in the law since the Court's prior decision, but none of these affect the validity of the previous conclusions. Specifically, the Court rejects the Commission's interpretation of Section 6(b)(1) as applying to "affirmative" agency disclosures, but not to disclosures made in response to FOIA requests. Where as in this case, an FOIA request is received for information from which the identity of a manufacturer can be readily ascertained and which is otherwise subject to Section 6(b)(1),

the Commission must comply with Section 6(b)(1) before disclosing that information. Furthermore, if the Commission fails to take reasonable steps to assure that the information is accurate and that disclosure will be fair and serve a statutory purpose, the information will be exempt from disclosure under FOIA Exemption 3. The TV-related accident data at issue here is exempt from disclosure, because the Court finds that the Commission still has not complied with Section 6(b). Finally, the Court finds that the disclosure of this information in its present unverified state and in a manner which identifies the manufacturers would result in irreparable harm to the plaintiffs for the reasons set forth in the Court's previous opinion. 404 F. Supp. at 373-74.

Accordingly, the plaintiffs' motion for summary judgment will be granted and a permanent injunction against the public disclosure of the accident data and the computer printout will be entered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No.75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISION, et al.

Judgment and Permanent Injunction.

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of October 23, 1975 (404 F. Supp. 352) and the Court's opinion of this date entered in these cases, it is

ORDERED

1. Summary judgment is hereby entered in favor of the plaintiffs and against the defendants.

2. Defendants' motions to vacate the outstanding preliminary injunction and for summary judgment are denied.

3. The defendants Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

4. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U. S. C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 12 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 12 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

5. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

6. Copies of this permanent injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: December 8, 1977.

/s/ JAMES L. LATCHUM
James L. Latchum
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Consumers Union of the United States, Inc. ("Consumers Union") and the Public Citizen's Health Research Group ("Health Research Group") hereby move this Court for leave to file a brief *amicus curiae* urging that the decision below be vacated for failure to comply with Rule 19 of the Federal Rules of Civil Procedure.

1. This appeal is from a decision in 12 consolidated actions enjoining the defendant Consumer Product Safety Commission from releasing certain information regarding accidents and hazards of color television sets submitted to it by the plaintiff-manufacturers. In each of these so-called "reverse Freedom of Information Act" cases, the manufacturer sued only the Consumer Product Safety Commission and its members ("CPSC"), but did not name Consumers Union or the Health Research Group, whose request for the documents led to the CPSC's decision to release them. Consumers Union and the Health Research Group are plainly concerned with, and will be affected by, the outcome of any decision in these cases, and they have brought their own Freedom of Information Act lawsuit in which both the CPSC and the 12 manufacturers have

been joined in the United States District Court for the District of Columbia. *See Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 561 F. 2d 349 (D. C. Cir. 1977), *on rehearing*, 565 F. 2d 721, *vacated for further consideration*, — U. S. — , 46 U. S. L. W. 3452 (Jan. 16, 1978).

2. The only issue that will be raised by the defendants-appellants here is the correctness of the ruling of the District Court on the merits of the controversy. *Amici*, however, seek to raise a different issue: the failure of the District Court and the parties to take into account the requirements of Rule 19 of the Federal Rules of Civil Procedure as it relates to the interests of *amici*. No attempt was made to join *amici* in the complaint, and no explanation was given for not doing so. The defendants did not seek to invoke Rule 19 or call it to the Court's attention, and the District Court did not raise the issue on its own. Therefore, if *amici* do not present this issue to this Court, no one will. Moreover, the question presented is an important one, going both to the Court's jurisdiction and to the efficient handling of reverse FOIA cases, and therefore should be considered by this Court.

3. Consents have been sought from both the CPSC and the manufacturers, but they have been denied.

4. If the Court permits the briefs which are lodged with this motion to be filed, the appellants should also be required to answer the contentions raised by *amici* at the time that the appellees' briefs are due, and not as part of any reply brief that appellants may file. This is essential in order to afford *amici* an opportunity, if they so desire, to submit a response when the reply briefs are due.

For the foregoing reasons, the brief of Consumers Union and the Health Research Group as *amicus curiae*

should be permitted to be filed, and all responses thereto should be served and filed at the time that the appellees' briefs are due on this appeal.

Respectfully submitted,

[Signatures of Counsel Deleted]

Date: Washington, D. C.

May 1, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INC., et al.

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, et al.

MOTION OF CONSUMER FEDERATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Consumer Federation of America ("CFA") moves, pursuant to Rule 29, Federal Rules of Appellate Procedure, for leave to file a brief as amicus curiae in the above-captioned matter.

INTEREST OF AMICUS CURIAE

CFA was incorporated in 1968 in the State of New York, and is composed of over 225 national, state, and local consumer organizations located throughout the nation, including those states encompassed by the Third Circuit. Representing over 30 million American consumers, CFA is the largest consumer organization in the United States. As such, CFA seeks to present the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts.

CFA has been active in a variety of court and agency proceedings pertaining both to consumer product safety and to the rights of the public under the Freedom of Information Act, 5 U. S. C. § 552 ("FOIA"). For example,

CFA has participated in the development of Consumer Product Safety Commission ("CPSC" or "Commission") regulations dealing with the reporting of consumer product safety hazards under § 15 of the Consumer Product Safety Act, 15 U. S. C. § 2064 ("CPSA"); recordkeeping requirements for consumer product safety complaints under § 16 of the CPSA, 15 U. S. C. § 2065; and regulations under § 6(b)(1) of the CPSA, 15 U. S. C. § 2055 (b)(1), the statutory provision whose construction is at issue in this case. Additionally, CFA has directed substantial effort toward proper implementation of the FOIA. CFA has sought to maximize public access to information possessed by federal agencies and has appeared as *amicus curiae* in various FOIA cases.* More specifically, CFA has already participated as *amicus curiae* in a Second Circuit case which involved the interrelationship between § 6(b)(1) and the FOIA.** Since this case involves the interpretation of a provision of important consumer protection legislation which affects citizen access to information under the FOIA, it is of particular interest to CFA and its members.

Reason Why CFA's Brief As Amicus Curiae Is Desirable

CFA proposes primarily to address two issues: 1) whether § 6(b)(1) of the CPSA was intended to apply

* *E.g.*, Consumers Union v. Heimann, No. 77-2115 (D. C. Cir.); Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, No. 77-1576 (6th Cir.); Chrysler Corp. v. Schlesinger, 565 F. 2d 1172 (3d Cir. 1977), *cert. granted*, — U. S. — (March 6, 1978); and Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190 (4th Cir. 1976), *cert. denied*, 431 U. S. 924 (1977).

** Pierce and Stevens Chemical Corp. v. Consumer Product Safety Commission, No. 77-6215 (2d Cir. 1978). At oral argument on April 4, 1978, the Second Circuit remanded this case to the district court essentially to make a final, rather than preliminary, determination of the propriety of injunctive relief.

to records sought pursuant to the FOIA; and 2) whether § 6(b)(1) is a withholding statute under exemption three of the FOIA, 5 U. S. C. § 552(b)(3). CFA proposes to address these issues from the perspective of consumers, and requesters of information under the FOIA. Moreover, it is our understanding from counsel that the defendant-appellant Commission will not directly address whether § 6(b)(1) provides the particularized substantive criteria necessary to qualify as a withholding statute under exemption three of the FOIA. Consideration of that issue, an issue reached by the court below, will be enhanced by the brief of CFA as amicus.

CFA is prepared to file its brief within the time allowed to the Commission. Therefore CFA submits that this motion will not result in any delay of these proceedings. Finally, it should be noted that the Commission has consented to CFA's participation as amicus curiae in this case.

Respectfully submitted,

[Signatures of Counsel Deleted]

May 12, 1978

Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED FEBRUARY 13, 1979
CERTIORARI GRANTED MAY 14, 1979

INDEX TO APPENDIX

	Page
Relevant Docket Entries	1
Complaint	14
Opinion of the District of Columbia District Court	21
Order of the District of Columbia District Court	32
Plaintiffs' Notice of Appeal	33
First Opinion of the Court of Appeals	34
Petition of Appellee RCA for Leave to Lodge Exhibits	50
Exhibits Lodged:	
Exhibit A—Preliminary Injunction Entered by the Delaware District Court	51
Exhibit C—Minute Order Entered by the Delaware District Court	55
Order of the Court of Appeals Granting Motions to Lodge Exhibits	56
Order of the Court of Appeals Denying Rehearing	58
Order of the Court of Appeals Denying Rehearing *En Banc*	61
Order of the Supreme Court	62
Second Opinion of the Court of Appeals	63

Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
1975	
May 5	COMPLAINT; Appearance.
May 5	SUMMONS Copies (27) and Copies (22) of complaint issued. * * *.
*	* * * * * * *
May 30	MOTION of deft. #18 [General Electric Co.] to dismiss or in the alternative for a stay of proceedings; P&A; Exhibits A-D; c/m 5-30-75.
*	* * * * * * *
June 3	ANSWER of deft. #12 [Motorola, Inc.] to complaint; c/m 6-3-75.
June 5	MOTION of deft. #16 [Sharp Electronic Corp.] to dismiss or in the alternative, for stay of proceedings; Exhibit A; c/m 6-5-75.
June 6	MOTION of deft. #9 [RCA Corp.] to dismiss; Memorandum in support; Exhibits A-F; c/m 6-6-75.
June 6	ANSWER of defts. #1, 2, 3, 4, 5, 6 & 7 [Federal Defendants] to complaint; c/m 6-6-75.
June 6	MOTION of defts. #8&14 [GTE Sylvania, Inc., & Aeronutronic Ford Corp.] for an order dismissing the complaint or, in the alternative, staying further proceedings herein; Memorandum in support; Tabs A&B; c/s 6-6-75.
*	* * * * * * *

DATE	PROCEEDINGS
1975	
June 16	ANSWER of deft. #15 [Matsushita Electric Corp. of America] to complaint; c/m 6-16-75.
June 16	CERTIFICATE of Service by deft. #15 [Matsushita Electric Corp. of America] as to service on all counsel on 6-16-75 of answer filed 6-16-75.
June 17	MOTION of deft. #17 [Toshiba of America, Inc.] to dismiss or in the alternative, for a stay of proceedings; Exhibit A; c/s 6-17-75.
*	* * * * * * *
June 25	MOTION of deft. #19 [Admiral Corp.] to dismiss or in the alternative, for a stay of proceedings; Exhibit A; c/m 6-25-75.
June 26	MOTION of deft. #10 [The Magnavox Co.] for an order dismissing the complaint or in the alternative, staying further proceedings; c/s 6-26-75.
*	* * * * * * *
June 30	MOTION of pltfs. for summary judgment; statement of material facts; P&A's; Exhibits A-R; c/m & c/s 6-30-75.
*	* * * * * * *
July 18	MOTION of deft. #11 [Zenith Radio Corp.] for an order to dismiss the complaint or, in the alternative, staying further proceedings; c/m 7-17-75.
*	* * * * * * *

DATE	PROCEEDINGS
1975	
July 24	MOTION of deft. #13 [Warwick Electronics, Inc.] to dismiss the complaint and to quash the return of service or in the alternative for stay of proceedings; Affidavit; P's & A's; copy of affidavit; c/m 7-24.
*	* * * * * * *
July 25	JOINT Memorandum of Aeronutronic Ford Corporation and GTE Sylvania Incorporated in reply to pltfs' memorandum in opposition to defts' motion to dismiss or in the alternative for a stay of proceedings; c/m 7-25-75.
Aug. 08	OPPOSITION by pltfs. to motion of deft. #13 [Warwick Electronics, Inc.] to quash the return of service of process; c/m 8-7-75.
Aug. 19	REPLY of deft. #13 [Warwick Electronics, Inc.] to pltfs.' opposition to motion to dismiss the complaint and to quash the return of service of process, or in the alternative for stay of proceedings; c/m 8-19.
Aug. 22	SURREPLY by pltfs. to deft's reply to pltffs' opposition to motion of deft. #13 [Warwick Electronics, Inc.] to dismiss the complaint and to quash the return of service of process or, in the alternative, for stay of proceedings; Attachment A, B & C; c/m 8-22-75.
Sept. 12	MEMORANDUM OPINION. (N) Richey, J.

DATE	PROCEEDINGS
1975	
Sept. 12	ORDER granting defts.' motion to dismiss; dismissing the complaint (signed 9-11-75) (N) Richey, J.
Sept. 23	NOTICE of appeal by pltfs. from order of 9-11-75 and filed 9-12-75; Deposit $5.00; copies mailed to all counsel of record.
Oct. 9	ORDER correcting several inadvertent errors in the Memorandum Opinion of 9-12-75. (N) Richey, J.
Nov. 3	RECORD on Appeal delivered to USCA; receipt acknowledged. (USCA No. 75-2059)
1976	
Feb. 19	CERTIFIED copy Order USCA entered 2-19-76 denying motion for summary reversal.

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
1975	
Nov. 3	Certified Original Record (no transcript) including 2 vols. of Orig. Record (n-6).
Nov. 3	4-Appellants' motion for summary reversal (m-3).

* * * * * * *

Nov. 12	4-Appellee's (Motorola) response to motion for summary reversal (m-10).
Nov. 13	4-Appellee's (General Electric Company) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (Admiral Corporation) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (Matsushita Electric Corporation of America) opposition to motion for summary reversal (m-13).
Nov. 13	4-RCA Corporation's (appellee) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (GTE Sylvania Inc., et al.) opposition to motion for summary reversal (m-13) (OK DMC).

* * * * * * *

Nov. 21	4-Memorandum of appellee Toshiba America, Inc. in opposition to appellants' motion for summary reversal (m-14).

DATE	FILINGS—PROCEEDINGS
1975	
Nov. 21	4-Appellee Warwick Electronics, Inc.'s memorandum in opposition to appellants' motion for summary reversal (m-17).
Nov. 21	4-Joint memorandum of appellees The Magnavox Co. and Zenith Radio Corp. in opposition to appellants' motion for summary reversal (m-17).
* * * * * * *	
Nov. 26	4-Appellees' opposition to motion for summary reversal (m-26).
* * * * * * *	
Dec. 2	4-Joint memorandum of appellees the Magnavox Co. and Zenith Radio Corp. in opposition to appellants' motion for summary reversal (m-17).
1976	
Feb. 19	Per Curiam order that appellants' motion for summary reversal is denied; Bazelon, CJ and Wilkey, CJ.
Feb. 19	Certified copy of the above order sent to Clerk, U.S. District Court, and a copy to Judge Richey.
* * * * * * *	
Apr. 5	15-Appellants' brief (m-5).
Apr. 5	7-Appellants' appendix (m-5).

DATE	FILINGS—PROCEEDINGS
1976	
Apr. 19	Letter from counsel for appellant advising that this case is filed under GRC Rule 7(c)(3) (Freedom of Information Act) (OK, RB).
* * * * * * *	
May 5	15-Joint brief of appellees—Admiral Corp., General Electric Co., Motorola, Inc., RCA Corp., Sharp Electronics Corp., Toshiba-America, Inc. and Warwick Electronics, Inc. (m-5).
May 5	15-Appellee's (Matsushita Electric Corp. of America) brief (m-5).
May 5	25-Appellee's (GTE Sylvania Inc. and Aeronutronic Ford Corp.) brief (m-5).
May 6	15-Appellees' (Magnavox Company and Zenith Radio Corp.) brief (m-6).
* * * * * * *	
June 2	7-Federal appellees brief (m-13).
June 2	15-Federal appellees' brief (m-21).
* * * * * * *	
Sept. 21	Argued before CJ Bazelon; Wright and Robinson, CJ.
1977	
July 5	Opinion for the Court filed by Circuit Judge Wright.

DATE	FILINGS—PROCEEDINGS
1977	
July 5	Judgment reversing judgment of the District Court and remanding for further proceedings in accordance with opinion filed this date.
* * * * * * *	
July 18	11-Appellees' petition for rehearing and suggestion for rehearing en banc (m-18).
July 18	11-Appellees' motion to file appendix to petition for rehearing and suggestion for rehearing en banc (m-18) (Aeronutronic Ford Corp., GTE Sylvania Inc., The Magnavox Co., Matsushita Electric Corp., Toshiba-America, Inc., and Zenith Radio Corp.).
July 19	11-Appellees' (Admiral Corp., General Electric Corp., Motorola, Inc., Sharp Electronics Corp., Toshiba-America, Inc., and Warwick Electronics, Inc.) petition for rehearing and suggestion for rehearing en banc (m-19).
July 19	4-Appellees' (Admiral Corp., et al) motion to lodge exhibits (m-19).
July 19	4-Appellee's (RCA Corp.) petition for rehearing and suggestion for rehearing en banc (m-19).
July 19	4-Appellee's (RCA Corp.) petition for leave to lodge exhibits attached to petition for rehearing and suggestion for rehearing en banc (m-19).

DATE	FILINGS—PROCEEDINGS
1977	
July 25	Per Curiam order that the time for filing the federal appellees' petition for rehearing is extended to August 2, 1977, and, that counsel for appellants are directed to file on or before August 22, 1977, a response to the petitions including those to be filed on August 2, 1977; CJ Bazelon; Wright and Robinson, CJ.
Aug. 2	11-Appellee's (Federal) petition for rehearing (m-2).
Aug. 18	11-Appellants' response to petitions for rehearing (m-17).
Aug. 24	4-Appellees' motion to lodge pertinent documents in related case with the court (m-19).
Aug. 25	Per Curiam order that the motions of Appellees, Admiral Corporation, et al to lodge exhibits on July 19, 1977; Appellees Aeronutronic Ford Corporation, et al to file an appendix to the petition for rehearing and suggestion for rehearing en banc; Appellees RCA Corporation for leave to lodge exhibits attached to petition for rehearing en banc; and on August 24, 1977 Consumer Product Safety Commission's motion to lodge certain documents in a related case are granted.
Aug. 25	11-Appellees' (Aeronutronic Ford Corp., et al) appendix to petition for rehearing and suggestion for rehearing en banc (m-18).

DATE	FILINGS—PROCEEDINGS
1977	
Aug. 25	11-Appellees (Admiral Corp., et al) exhibits in support of petition for rehearing en banc—LODGED.
Aug. 25	11-Appellees (RCA Corp.) exhibits to petition for rehearing en banc—LODGED.
Aug. 25	4-Appellees (Consumer Product Safety Comm.) certain documents in a related case—lodged.
Aug. 25	Per Curiam order that the applications for rehearing are denied for the reasons stated in the attached per curiam; CJ Bazelon; Wright and Robinson, CJ.
Aug. 25	Per Curiam order en banc that the suggestion for rehearing en banc are denied; CJ Bazelon; Wright, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ.
* * * * * * *	
Sept. 9	Per Curiam order granting various motions for stay of mandate; the Clerk is directed not to issue the mandate prior to October 4, 1977. CJ Bazelon; Wright and Robinson CJ's.
Oct. 11	Certified copy of notice from Clerk, Supreme Court notifying that petition for writ of certiorari was filed in SC No. 77-508 on October 3, 1977.

DATE	FILINGS—PROCEEDINGS
1978	
Jan. 26	Certified copy of order of the Supreme Court granting petition for writ of certiorari in S.C. #77-508 on January 16, 1978.
Jan. 26	Certified copy of order of the Supreme Court vacating judgment of the USCA and remanding case to USCA for further consideration in light of the permanent injunction entered by the U.S. District Court for the District of Delaware on December 8, 1977, in Civil Action No. 75-104; filed January 16, 1978 in S.C. #77-508.
Jan. 30	4-Appellees' (GTE Sylvania, etc) motion to set briefing schedule (m-30).
Jan. 30	4-Appellees' (GTE Sylvania, etc) motion to lodge exhibits (m-30).
Feb. 24	4-Appellants' motion to set briefing schedule on remand (m-24).
Sept. 20	Per Curiam order that the parties file, within 20 days, memoranda in typewritten form setting forth their views as to the course this Court should take in light of the remand of the case by the Supreme Court to this Court for further consideration. The parties are instructed to address with particularity the question whether the permanent injunction entered in Civ. No. 75-104 (D.Del Dec. 8, 1977), bars appellants, who were not parties in that case, from litigating in this case their claim

DATE	FILINGS—PROCEEDINGS
1978	
	that the materials at issue should be disclosed; CJ Wright, Bazelon and Robinson, CJ's.
* * * * * * *	
Oct. 30	7-Appellee's (Manufacturers) memorandum in response to this Court's order of September 20, 1978 (m-30).
Oct. 30	15-Appellants' memorandum in response to the Court's order of September 20, 1978 (m-30).
* * * * * * *	
Nov. 9	4-Memorandum of Consumer Product Safety Commission, et al. (m-2).
Dec. 22	Opinion for the Court filed by Circuit Judge Robinson.
Dec. 22	Judgment that the case is remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date.
Dec. 22	4-Letter from counsel for appellee (CPSC) in the nature of an 8(g) letter (OKGF).
1979	
* * * * * * *	
Jan. 23	Per Curiam order granting appellees' motions for stay of mandate and the Clerk is directed not issue the mandate in this case prior to 2/12/79; CJ Wright; Bazelon & Robinson, CJs.

DATE	FILINGS—PROCEEDINGS
1979	
Feb. 14	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on February 12, 1979 in SC No. 78-1248.
Feb. 15	Certified certificate from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 78-1248 on February 12, 1979 and is now pending.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
Plaintiffs,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,
GTE SYLVANIA, INC.,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION
OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA OF AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.

1. This is an action under the Freedom of Information Act, as amended, 5 U. S. C. § 552 ("the Act"), by consumer organizations seeking an opportunity to inspect and/or copy documents in the possession of the Consumer Product Safety Commission concerning television-related accidents.

2. This Court has jurisdiction over the subject matter of this Complaint pursuant to 5 U. S. C. § 552(a)(3); 5 U. S. C. § 702; and 28 U. S. C. § 2201-02. Venue is properly laid in this district pursuant to the Act, 5 U. S. C. § 552(a)(3).

3. Plaintiff Consumers Union of United States, Inc. ("Consumers Union"), with several hundred thousand members, many of whom are owners or prospective owners of televisions which are or may be hazardous, is the largest consumer organization in the United States. It was organized in 1936 as a nonprofit organization under the laws of the State of New York to provide information, education and counsel on consumer goods and services. Consumers Union publishes *Consumer Reports,* a monthly magazine of consumer information with a paid circulation of more than 2 million readers. Consumers Union tests and rates consumer products, including televisions, and gathers other information relating to the performance, including safety performance, of these products. *Consumer Reports* regularly carries, and plans to carry in the future, articles reflecting such testing and rating of televisions.

Plaintiff Public Citizen is a nonprofit organization supported by voluntary donations from individuals, many of whom are owners or potential owners of television sets which are or may be hazardous. Public Citizen funds

the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

4. Defendant Consumer Product Safety Commission ("the Commission") is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U. S. C. § 2051 *et seq.*

Defendant Richard O. Simpson is Chairman of the Commission.

Defendants Barbara Franklin, Lawrence Kushner, Constance Newman, and R. David Pittle are Commissioners of the Commission.

Defendant Sadye Dunn is the Secretary of the Commission and the official designated by the Interim Freedom of Information Guidelines of the Commission to bear ultimate responsibility for responding to requests for records. (39 Fed. Reg. 30299, August 21, 1974).

Defendants GTE Sylvania, Inc., RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Motorola, Inc., Warwick Electronics, Inc., Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Sharp Electronics Corporation, Toshiba of America, Inc., General Electric Company, and Admiral Corporation are each corporations which manufacture television equipment and do business in the District of Columbia. Said defendants are hereinafter referred to collectively as "defendant corporations."

5. By separate letters dated June 14, 1974, plaintiffs each requested from defendant Commission under authority of the Act, an opportunity to inspect and/or copy documents relating to the safety of television sets, which documents were submitted by defendant corporations to the Commission in response to the Commission's Special Orders ("Special Orders") dated May 13, 1974.

In oral conversations, plaintiffs, defendant Dunn and other representatives of the defendant Commission agreed to extend the request to documents submitted by defendant corporations in response to Commission subpoenas directed to the defendant corporations and dated July 26, 1974.

6. Subsequently, plaintiffs limited their request to include only (a) the aforesaid submitted documents concerning television-related accidents and (b) documents resulting from Commission processing of such submitted documents, but excluding (1) legal correspondence which is within the attorney-client relationship or the attorney work product doctrine, and (2) the names and addresses of accident victims. Documents embraced within this limited request are hereinafter referred to as "the requested documents."

7. On November 5, 1974, following various efforts by plaintiffs to obtain Commission action on their requests, plaintiffs, defendant Dunn and other employees of the Commission met to discuss the status of plaintiffs' request, at which meeting plaintiffs protested defendant Commission's refusal, based upon blanket claims of confidentiality asserted by the defendant corporations, to disclose the requested documents. Commission representatives responded that a legal determination as to the availability of the requested documents for which claims of confidentiality had been advanced would be completed by mid-March 1975. By letter dated November 18, 1974, plaintiffs acquiesced to this timetable, but expressly reserved the right to consider additional delay as constituting a denial of their request.

8. On March 28, 1975, defendant Commission determined, *inter alia*, that the requested documents do not constitute exempt information under the Act, 5 U. S. C.

§ 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety.

9. By letter dated April 8, 1975, defendant Commission notified defendant corporations of the Commission's decision to release the requested documents. By telegram of April 17, 1975 (and correction of April 21, 1975), the Commission notified defendant corporations that no requested documents would be released until May 1, 1975.

10. By filing separate actions on or after April 22, 1975, in the United States District Court for the District of Delaware, defendants GTE Sylvania, Inc. (Civil Action 75-104), RCA Corporation (Civil Action 75-108), The Magnavox Company (Civil Action 75-112), Zenith Radio Corporation (Civil Action 75-113), Motorola, Inc. (Civil Action 75-114), Warwick Electronics, Inc. (Civil Action 75-115), and Aeronutronic Ford Corporation (Civil Action 75-116) have sought injunctions against disclosure, *Inter alia,* of the requested documents.

By filing separate actions on or after April 22, 1975, in the United States District Court for the Southern District of New York, defendants Matsushita Electric Corporation of America (Civil Action 75-2040), Sharp Electronic Corporation (Civil Action 75-2049), and Toshiba of America, Inc. (Civil Action 75-2050) have sought injunctions against disclosures, *inter alia,* of the requested documents.

Defendant General Electric Company filed suit (Civil Action 75-CV-189) in the United States District Court for the Northern District of New York seeking an injunction against disclosure, *inter alia,* of the requested documents.

Defendant Admiral Corporation (Civil Action 75-531) filed suit in the United States District Court for the Western District of Pennsylvania seeking an injunction against disclosure, *inter alia,* of the requested documents.

11. Defendant corporations applied for temporary restraining orders prohibiting disclosure of the requested documents in each of the actions described in paragraph 10 hereof. In each case, the Commission has consented to said applications and as a result, temporary restraining orders have been entered in each case for periods of up to 60 days, and disclosure of the requested documents to plaintiffs has thereby been prevented.

12. By letter dated April 28, 1975, plaintiff Consumers Union notified defendant Commission and defendant Dunn that the Commission's action in consenting to such a temporary restraining order would be deemed a denial of plaintiffs' rights to the requested documents and that plaintiffs would seek their remedy in court.

13. The requested documents are subject to mandatory disclosure under the Act, and the continued and prolonged withholding of such documents by defendant Commission, including its consent to applications by defendant corporations for said temporary restraining orders violates the Act. Plaintiffs have been and are irreparably harmed thereby and lack an adequate remedy at law.

WHEREFORE, plaintiffs pray:

(1) that this Court declare that the requested documents must be made immediately available to plaintiffs for inspection and/or copying;

(2) that this Court permanently enjoin defendant Commission and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying of the requested documents;

(3) that this Court expedite these proceedings;

(4) that this Court award plaintiffs their costs and disbursements in this action, including reasonable counsel fees; and

(5) that this Court grant such other relief as the Court may deem just and proper.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 11, 1975

Opinion.

RICHEY, *District Judge.*

Plaintiffs Consumers Union of United States, Inc., and Public Citizens' Health Research Group filed this action on May 5, 1975, seeking access under the Freedom of Information Act, 5 U. S. C. § 552, to certain reports on television accidents submitted to the Consumer Product Safety Commission (CPSC) by various television manufacturers. The defendants in this case are the CPSC, its Chairman, Commissioners, and Secretary; and twelve television manufacturers which submitted the reports in question. The plaintiffs seek relief in the following form: (a) a declaration that the requested documents, currently in possession of the CPSC, must be made immediately available to the plaintiffs for inspection and/or copying; and (b) an injunction enjoining the CPSC and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying.

The case is currently before the Court on the motions of ten television manufacturers to dismiss or, in the alternative, to stay these proceedings.[1] The defendants claim that with respect to the Government, the complaint fails to present a "case or controversy" within the meaning of Article III, section 2 of the United States Constitution,[2] and that with respect to the manufacturers the complaint fails to state a claim upon which relief can be granted. The defendant-manufacturers also claim that because a similar action involving virtually the same issues is pending in the United States District Court for the District of Delaware, this action should be dismissed in the interests of comity and judicial economy.

I. Background.

A somewhat complex course of events provides the background for this action. In May, 1974, the CPSC issued special orders to television manufacturers requesting that they submit, *inter alia*, all accident reports collected by the manufacturers since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate which, if any, of the reports they submitted were, in the manufacturers' view, entitled to exemption from disclosure under the Freedom of Information Act (FOIA). In June, 1974, plaintiffs herein requested access, under the FOIA, to the documents submitted by the manufacturers in response to the CPSC's orders of the previous month. While the

1. Defendants Admiral, Aeronutronic Ford, General Electric, GTE Sylvania, Magnavox, RCA, Sharp, Toshiba, Warwick, and Zenith have so moved. The remaining defendants, Motorola, Matsushita, and the CPSC, have in effect so moved by praying for dismissal in their answers to the plaintiffs' complaint.

2. The federal defendant has also, in effect, so moved. See note 1, *supra*, and Answer of the Consumer Product Safety Commission at "First Defense".

plaintiffs were given access to those reports for which confidentiality was not claimed by the manufacturers, the plaintiffs were not immediately afforded access to the documents which the manufacturers claimed were exempt from the FOIA. Instead, the CPSC, in August, 1974, informed the manufacturers of the plaintiffs' FOIA request and directed the manufacturers to substantiate their claims of confidentiality. In the meantime, the CPSC had determined, in July, 1974, that the manufacturers' response to its first request for documents was not complete; the CPSC ordered the manufacturers to make further submissions and extended the plaintiffs' FOIA request to the additional data submitted by the manufacturers. Plaintiffs subsequently limited their request to exclude documents protected by the attorney-client privilege or the work-product doctrine and those portions of documents which contained the names and addresses of accident victims.

With their request still unanswered, plaintiffs informed the CPSC in October, 1974, that any further delay would be considered by the plaintiffs as a denial of their request under the FOIA. As a result of that communication, representatives of the plaintiffs and the CPSC met in November, 1974, and agreed upon a timetable for the completion of CPSC's review of the voluminous submissions. It was estimated that the CPSC's legal determination as to the availability of the requested documents would be completed by mid-March of 1975. Plaintiffs acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.

On March 28, 1975, the CPSC issued its legal determination that the documents requested by the plaintiffs did not fall within the exemptions of the FOIA and that, even if the data were exempt, disclosure by the CPSC was

nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety. The CPSC subsequently notified the television manufacturers of its decision to release the requested documents and of its intention to withhold disclosure until May 1, 1975. Upon said notice, seven of the defendant television manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware,[3] each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[4] the United States District Court for the Northern District of New York,[5] and the United States District Court for the Western District of Pennsylvania.[6] In all of the actions, the manufacturers applied for temporary restraining orders prohibiting the release of the documents pending determination of their motions for preliminary injunction. The CPSC consented to the temporary restraining order in at least some of the cases.[7]

3. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith, (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116).

4. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049), and Toshiba (C. A. No. 75-2050), filed actions in the Southern District of New York.

5. General Electric (75-CV-189) filed suit in the Northern District of New York.

6. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

7. The plaintiffs claim that the agency consented to the orders in all of the cases filed by the manufacturers. Plaintiffs' complaint at ¶ 11. The CPSC claims that it consented to some but not all of the orders. Answer of the Consumer Product Safety Commission at ¶ 11. For purposes of this motion to dismiss, plaintiffs' allegations are taken as true.

The instant action was filed on May 5, 1975. Subsequently, the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[8] Oral arguments on the preliminary injunction motion in the consolidated cases were heard by Chief Judge Latchum in July, 1975. The documents in question in both this action and the consolidated cases in Delaware remain in the possession of the CPSC and subject to the above-mentioned restraining orders pending Judge Latchum's decision on the motion for preliminary injunction.[9]

II. No Case or Controversy Exists Between Plaintiffs and the CPSC.

Plaintiffs invoke the jurisdictional sections of the FOIA, 5 U. S. C. § 552(a)(3), and the Administrative Procedure Act, 5 U. S. C. § 702, as bases for this Court's jurisdiction in this case.[10] Both statutes pertain to actions against federal agencies. In this case, plaintiffs seek an order instructing the agency to provide plaintiffs access to the documents in question for inspection and/or copying. At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under

8. *In re: Consumer Product Safety Commission Litigation*, Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152 (D. Del.).

9. The statement of facts above is drawn from all of the substantive pleadings in this case.

10. Plaintiffs also invoke the Declaratory Judgment Act, 28 U. S. C. § 2201-02, as a ground for this Court's jurisdiction, plaintiffs' complaint at ¶ 2. The Declaratory Judgment Act is not, however, a statute which confers jurisdiction. See, *e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950).

the FOIA.[11] The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding of March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case.

The Constitution extends federal courts' jurisdiction only to specified cases and controversies.[12] Implicit in the "case and controversy" doctrine is the requirement that litigation must arise "between adverse litigants." *Muskrat v. United States*, 219 U. S. 346, 361 (1911); *Aetna Life Insurance Co. v. Hawarth*, 300 U. S. 227 (1937). Where opposing litigants desire "the same result," as here, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971); *General Electric Co. v. Bootz Mfg. Co.*, 289 F. Supp. 504 (D. Ind. 1968). This Court is faced with the prospect in the instant action that both the plaintiffs and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA. In such a posture, this case does not present a question "in an adversary context," as required by the Constitution. *Flast v. Cohen*, 392 U. S. 83, 95 (1968).

Plaintiffs contend, however, that the "controversy" which they present as between themselves and the agency centers on the agency's failure to contest the temporary restraining orders issued in the now-consolidated cases brought by the manufacturers. According to the plaintiffs, the agency's failure to contest the orders constituted a violation of the agency's duty under the FOIA to speedily deliver the documents in question once a determination

11. See plaintiffs' complaint at ¶ 13.

12. U. S. Const., art. III, § 2. See *Golden v. Zwickler*, 394 U. S. 103 (1969); *Baker v. Carr*, 369 U. S. 186 (1969).

was made that such documents were subject to disclosure. Plaintiffs also allege that the agency's failure to contest the orders reflects a certain lack of good faith toward the plaintiffs.

As an initial matter, this Court notes, admittedly without having all of the facts before it,[13] that it does seem curious that the agency, having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining orders. However, regardless of any possible impropriety on the agency's part, its failure to contest the motions does not present a "controversy" between plaintiffs and the CPSC in this case. Plaintiffs do not ask for a mere declaration that the agency "shouldn't have" consented to the orders—it is doubtful, in fact, that such a "wrong" would be actionable. Plaintiffs ask instead that the agency be ordered to release the documents to the plaintiff, and a decision to that effect made by this Court would necessarily entail a determination that the documents are subject to disclosure under the FOIA. As discussed above, there is no adversity between the agency and the plaintiffs, and thus no case or controversy, with respect to the FOIA issue.

Plaintiffs point to the case of *Robertson v. Department of Defense*, Civil No. 74-644 (D. D. C., June 19, 1975), in support of their claim that a controversy exists in the instant action. *Robertson* involved a very similar fact situation to this case. The General Motors Corporation had submitted certain documents to the Department of Defense which Robertson subsequently requested, for purposes of inspection, under the FOIA. The Department determined that some *but not all* of the documents were

13. See note 7, *supra*.

subject to FOIA disclosure. General Motors thereupon sued the Department and other federal defendants in the United States District Court for the Eastern District of Virginia, seeking an injunction against the disclosure of the documents. Robertson countered by filing an FOIA suit against the Department and General Motors in this Court. In allowing the plaintiff to maintain suit, Judge Barrington D. Parker pointed out what is, for purposes of the instant case, the crucial characteristic of *Robertson*: "[I]n the Virginia proceeding and in the matter before this Court, the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act." Memorandum Opinion of June 19, 1975, at 8. In *Robertson*, unlike the instant action, there were areas of disagreement between the plaintiff and the governmental defendant.[14]

In essence, what the plaintiffs ask this Court to do in the instant case is to re-determine whether the restraining orders obtained by the manufacturers in various federal district courts should have issued. It is true that the CPSC consented to the various orders. Nonetheless, it was the responsibility of each court—and this Court cannot but assume that said responsibility was met—to make an independent determination that an order was justified. See, *e.g.*, Judge Latchum's Temporary Restraining Order of April 23, 1975, in *RCA Corp. v. United States Consumer Product Safety Commission*, Civil No. 75-108 (D. Del. filed April 22, 1975). As the United States Court of Ap-

14. Plaintiffs also question the genuineness of the agency's conclusion on the FOIA issue: "[E]ven if the Commission should prevail in the Delaware action, it could then decide as a discretionary matter to refuse to disclose the data to plaintiffs." Plaintiffs' Motion for Summary Judgment at 43 n. * *. But the agency has assured the Court on the public record that "disclosure will be made as soon as the federal defendants are not enjoined from doing so." CPSC's Answer at ¶ 13.

peals for the District of Columbia Circuit has noted, "in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own." *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951 (1964) (footnote omitted).

III. Plaintiffs' Complaint Fails to State a Claim Against the Defendant-Manufacturers Upon Which Relief Can Be Granted.

As noted above, this case is brought under the FOIA and the Administrative Procedure Act. Those statutes entitle a claimant to relief against federal agencies and, accordingly, plaintiffs' complaint is styled to request relief from inaction by the CPSC. Plaintiffs have also named twelve television manufacturers as defendants in this case, but no relief is requested from the manufacturers. Indeed, the manufacturers are in no position to provide relief inasmuch as the documents in question are in the possession of the agency. Thus, as to the defendant-manufacturers, plaintiffs "can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957). The defendant-manufacturers would thus seem to be entitled to dismissal under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' failure to state a claim upon which relief can be granted.

Plaintiffs maintain, however, that because the defendant-manufacturers have such a strong interest in the outcome of this litigation, they are subject to suit under the compulsory joinder provision of Fed. R. Civ. P. 19(a). Assuming *arguendo* that Rule 19(a) could be so employed in the current litigation, the plaintiffs would nonetheless be faced with an uncleared hurdle: lack of jurisdiction.

As noted in the preceding section, there is no case or controversy between plaintiffs and the federal defendant. Lack of a case or controversy is a jurisdictional defect. See *Aetna Life, supra; Tilley Lamp Co. v. Thacker,* 454 F. 2d 805, 808 (5th Cir. 1972). Plaintiffs have suggested that "even assuming *arguendo* that no live case or controversy existed between plaintiffs and the Commission, nothing is clearer than that a very live case or controversy exists between plaintiffs and the manufacturers." Plaintiffs' Motion for Summary Judgment at 35. Plaintiffs would thus provide the missing jurisdictional ingredient of case or controversy by joining, under Rule 19(a), the defendant-manufacturers who certainly possess an interest adverse to plaintiffs' in this litigation. The plaintiffs' solution is ingenious but unfortunately not authorized by Rule 19, which is "predicated upon the preexistence of federal jurisdiction over the cause of action . . ." *Letmate v. Baltimore and Ohio R. R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970). Rule 19 canot be used "in a way that would extend the subject matter jurisdiction of the Federal courts; indeed, Rule 82 precludes any construction of the Rule that would have such an effect." 7 Wright and Miller, *Federal Practice and Procedure* § 1602, at 20 (footnote omitted); see also *Anderson v. United States,* 217 F. Supp. 814 (E. D. Pa. 1963).

IV. Conclusion.

Plaintiffs' complaint must therefore be dismissed for failure to present a case or controversy as to the federal defendant and failure to state a claim upon which relief can be granted as to the defendant-manufacturers.[15] In

15. Defendant-manufacturer Warwick has moved for dismissal on the additional grounds that this Court lacks personal jurisdiction over Warwick. In view of the Court's disposition of this case, it is unnecessary to consider Warwick's motion.

reaching this conclusion, the Court notes that it is especially reluctant to bar the courthouse door when the plaintiff is, as in the instant case, a representative of the public interest. But the Constitution demands no less, considering the present posture of this case.

The Court is aware of the possibility that plaintiffs failed to intervene in the Delaware proceedings in the hope that this Court would assume jurisdiction in the present case. In declining to do so, this Court in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding.

An order in accordance with the foregoing Memorandum Opinion will be issued of even date herewith.*

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: September 11, 1975

* The Opinion of the District of Columbia District Court is reproduced as corrected by the October 9, 1975 Order of the District of Columbia District Court correcting inadvertent errors.

Order of the District of Columbia District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Order.

This case has come before the Court on the motions of various defendants to dismiss and the plaintiffs' opposition thereto. The Court has considered the extensive pleadings filed by the parties in this case, and for the reasons set forth in the memorandum opinion of the Court of even date herewith, concludes that the case should be dismissed because: (a) as to the federal defendant, plaintiffs do not present a case or controversy within the meaning of Article III, section 2 of the United States Constitution; and (2) as to the defendant-manufacturers, plaintiffs do not state a claim upon which relief can be granted.

Therefore, it is, by the Court, this 11th day of September, 1975,

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that this case be, and the same hereby is, dismissed.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Court

Plaintiffs' Notice of Appeal

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al., *Plaintiffs,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants.*

Notice of Appeal

Notice is hereby given that Consumers Union of United States, Inc. and Public Citizens Health Research Group, plaintiffs in the above-named action, hereby appeal to the United States Court of Appeals for the District of Columbia from the order granting defendants' motion to dismiss entered in this action on the eleventh day of September, 1975.

[Signatures of Counsel Deleted]

Dated: September 22, 1975

FIRST OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges.*

Argued September 21, 1976
Decided July 5, 1977

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: We consider here an appeal from a dismissal of an action brought by the appellants under the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1970 & Supp. V 1975). They seek to obtain, from the Consumer Product Safety Commission, reports which various television manufacturers have submitted on television-related accidents.

For the reasons stated below, we reverse the District Court's dismissal of the plaintiffs' action and remand the case for further proceedings.

I. THE PARTIES

Appellant Consumers Union is a nonprofit consumer organization. It provides information—through its monthly magazine *Consumer Reports* and through other means—on the merits, defects, dangers, and comparative efficacy of consumer goods, including television sets. Appellant Public Citizen, also a nonprofit organization, funds the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

Appellee Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to its enactment of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). The Commission's purpose is to help implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] Several of the officers of the Commission and 12 companies that manufacture television sets and do business in the District of Columbia were, together with the Commission, also named as defendants below and are also appellees before this court.

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1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U. S. C. § 2051(b) (Supp. V 1975).

II. Background

The background of the present impasse is extensive and, in some respects, complex. In March 1974 the Commission issued a public notice [2] announcing that it would hold a public hearing to investigate hazards encountered during operation of television receivers and to consider the necessity of developing safety standards for such receivers. In the notice the Commission requested certain technical information and data on television-related accidents from manufacturers of television sets and component parts. In particular the Commission requested that the manufacturers submit all accident reports collected since the National Commission on Product Safety held hearings on the subject in 1969.[3] Although a few manufacturers complied with the Commission's request, the principal response consisted of a six-page summary of accident data supplied by the Electronics Industry Association (EIA).

After reviewing the data voluntarily submitted, the Commission concluded that the "information submitted to the Commission by the EIA on behalf of the [companies did] not satisfy the Commission's request."[4] Accordingly, on May 13, 1974 the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1) (Supp. V 1975), sent special orders to 25 manufacturers seeking specified information.[5] In the cover letter accompanying the special orders the Commission noted the possibility of a request for public access to this information via the FOIA, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to substantiate any such claims. Claims of confidentiality accompanied the responses of most manufacturers. Again the Commission reviewed the submitted data and again the Commission found that certain of the manufacturers had not complied with the request. Thus on July 26, 1974 supoenas [sic] *duces tecum* were issued to the appellee manufacturers and three other manufacturers [6] requiring production of specified technical information and all television-related accident data.

Appellants' first request for access, under the FOIA, to data submitted by the manufacturers was in June 1974 and pertained to the documents submitted in response to the Commission's special orders of the previous month.[7] Although appellants were given access to those reports for which confidentiality was not claimed by the manufacturers, they were not allowed access to documents which the manufacturers claimed were exempt from the FOIA.[8] Instead, in August 1974 the Commission informed the manufacturers of appellants' FOIA request and again directed the manufacturers to substantiate their claims of confidentiality. The Commission also extended appellants' FOIA request to the additional data which the Commission later subpoenaed from the manufacturers.[9]

2. 39 Fed. Reg. 10929 (March 22, 1974).

3. *Id.*

4. *E.g.*, Special Order of the Commission to General Electric Company, Docket Item 11A, Ex. A-1, in Civil Action (CA) No. 75-136 (D. Del.).

5. Of the appellee manufacturers here, apparently only RCA did not receive a special order. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, 404 F. Supp. 352, 358 n. 11 (D. Del. 1975).

6. Sony Corporation, Sanyo Electric, Inc., and Wells-Gardner Electronics Corporation were subpoenaed but did not seek to bar public disclosure of data they forwarded to the Commission. Evidently the Commission did not order all manufacturers of television sets sold in this country to submit accident reports. *GTE Sylvania Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 359 n. 18.

7. *Consumers Union of United States v. Consumer Product Safety Com'n*, 400 F. Supp. 848, 850 (D. D. C. 1975).

8. *Id.*

9. *Id.*

Appellants subsequently limited their request to exclude documents protected by the attorney-client privilege or the work product doctrine and those portions of documents that contained names and addresses of accident victims. Even with this limitation, however, appellants' request went unfulfilled.[10] In October 1974, therefore, four months after their initial request, appellants informed the Commission that they would consider any further delay to be a denial. As a result of that communication, representatives of appellants and the Commission met in November 1974 and agreed upon a timetable for completion of the Commission's review of the manufacturers' submissions. It was estimated that the Commission's legal determination as to availability of the requested documents would be completed by mid-March of 1975. Appellants acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.[11]

On March 28, 1975—nine months after appellants' initial request—the Commission issued its legal determination that the documents requested by appellants did not fall within the exemptions of the FOIA. It also stated that, even if the data were exempt from mandatory disclosure, disclosure by the Commission was nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety.[12] The Commission subsequently notified the television manufacturers of its decision to release the requested documents on May 1, 1975. After receiving that notice, seven of the manufacturers filed separate actions against the Commission in the United States District Court for the District of Delaware,

10. *Id.*

11. *Id.*

12. *Id.*

each seeking an injunction prohibiting disclosure on the ground that release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975).[13] Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[14] the United States District Court for the Northern District of New York,[15] and the United States District Court for the Western District of Pennsylvania.[16] In all of the actions the manufacturers applied for temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunctions. The Commission consented to the temporary restraining orders in at least some of the cases.[17] Subsequently the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[18] Even though

13. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (CA No. 75-104), RCA (CA No. 75-108), Magnavox (CA No. 75-112), Zenith (CA No. 75-113), Motorola (CA No. 75-114), Warwick (CA No. 75-115), and Aeronutronic Ford (CA No. 75-116).

14. Matushita (CA No. 75-2040), Sharp (CA No. 75-2049), and Toshiba (CA No. 75-2050) filed actions in the Southern District of New York.

15. General Electric (75-CV-189) filed suit in the Northern District of New York.

16. Admiral (CA No. 75-531) filed suit in the Western District of Pennsylvania.

17. Appellants claimed below that the Commission consented to the orders in all of the cases, while the Commission claimed it consented to some but not all of the orders. For purposes of the motion to dismiss, the District Court below accepted appellants' allegations as true. Memorandum Opinion, *supra* note 7, at 5. Because our disposition on appeal does not turn on the number of orders that the Commission consented to, we do not feel it necessary to resolve the issue here or to remand it to the District Court.

18. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, *supra* note 5.

Rule 65(b) of the Federal Rules of Civil Procedure has been held to limit the duration of temporary restraining orders to a total of 20 days, absent consent by the party against whom the order was directed, *Sims v. Greene*, 160 F. 2d 512, 516 (3d Cir. 1947), the Commission did not object to requests for further extensions of the temporary restraining orders, with the result that oral argument on the manufacturers' preliminary injunction motions was not heard until July 23, and the stays against the Commission's releasing the information continued until those motions were decided. A preliminary injunction, which the Commission did oppose, was entered on October 23, 1975, prohibiting production of the data.[19] For whatever reason, the appellants did not seek to intervene in this action either to contest the manufacturers in Delaware or to have the action transferred to the District of Columbia. And despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the court did not on its own motion inquire about the necessity of joining appellants under Rule 19, FED. R. CIV. P.

After the District Court for the District of Delaware entered the preliminary injunction, the Commission filed an interlocutory appeal. The Commission subsequently filed a voluntary motion for dismissal of the appeal, however, and on May 10, 1976 the motion was granted.[20]

19. *Id.*

20. The Commission's motion is on file with the clerk of the Third Circuit, Docket Nos. 76-1095–76-1107.

On August 20, 1976 the District Court "closed out" the case with no further action planned.

III. THE DECISION BELOW

The instant FOIA litigation was filed in the District Court for the District of Columbia on May 5, 1975 and appellants promptly moved for summary judgment. The Commission and the manufacturers, however, moved to dismiss this action on the ground that no case or controversy existed between appellants and the Commission or, in the alternative, to stay the proceedings pending the decision in Delaware.

Four months later and 15 months after appellants initially asked the Commission for access to the documents, the District Court, without oral argument, filed an opinion and entered an order dismissing the action.[21] The District Court concluded that between appellants and the Commission there was no case or controversy since "on the crucial issue in this case"—the claim that the documents are subject to mandatory disclosure under the FOIA—appellants and the Commission "came to the exact same conclusion": that the documents had to be disclosed.[22] The only reason the Commission was not disclosing the documents, according to the court, was that it was prevented from doing so—first by the several temporary restraining orders and then by the preliminary injunction issued by the District Court for the District of Delaware. The court further concluded that, between

21. *Consumers Union of United States v. Consumer Product Safety Com'n*, *supra* note 7.

22. *Id.*, 400 F. Supp. at 851. This most definitely is not, however, "a situation in which [the Government] confesses error and represents that the error will be corrected without need for further court action." *Goosby v. Osser*, 409 U. S. 512, 516 n. 4 (1973), and cases cited therein.

appellants and the manufacturers, there was a failure to state a claim upon which relief could be granted.[23]

IV. The Issues on Appeal

We conclude that the District Court erred, and that there is a case or controversy[24] between appellants and the Commission. At its narrowest compass the case or controversy to be resolved concerns the threshold question of the scope and effect of the proceedings in Delaware. The Commission, echoed by the manufacturers, renews on appeal its argument—accepted by the District Court—that, although it would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so. Appellants disagree and deny that the preliminary injunction entered in Delaware absolves the Commission of what they believe is the Commission's statutory duty to furnish the requested documents.

This substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement.[25] The scope and

23. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 853.

24. "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Railway Commission,* 32 F. 241, 255 (Circuit Court, N. D. Cal. 1887) (Field, Cir. J.), *quoted in Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 239 (1937).

25. In his opinion in *Aetna Life Ins. Co. v. Haworth, supra* note 24, Chief Justice Hughes provided a now classic explanation of the requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action,[26] and the judgment entered by the Delaware District Court suggests no reason why it should be considered an exception.

Moreover, the Commission's conduct of the Delaware litigation provides a second, independent reason for rejecting appellees' contention that a case or controversy is lacking. In fact, reviewing both the administrative and litigational prelude to the instant appeal, the Commission's conduct, in several instances, is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed.[27] On

25. (Cont'd.)

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * *

300 U. S. at 240-241 (citations omitted).

26. *See* Restatement (Second) of Judgments § 68 (Tent. Draft No. 1, 1973); Advisory Committee Note, 39 F. R. D. 69, 106 (1966), *citing* Restatement of Judgments § 68, comment (h), § 116 (1942); F. James, Civil Procedure § 11.5, at 534-535 (1965); 1B J. Moore, Federal Practice ¶ 0.441[1] at 3772-3773 (Moore & Currier ed. 1974), *quoting Cromwell v. County of Sac,* 94 U. S. (4 Otto) 351, 352-353 (1877). *See also, e.g., Hansberry v. Lee,* 311 U. S. 32, 40-41 (1940); *Gonzales v. Cassidy,* 474 F. 2d 67, 72 (5th Cir. 1973); *Research Corp. v. Edward J. Funk & Sons, Co.,* 15 F. R. Serv. 2d 580 (N. D. Ind. 1971).

We take it to be established beyond cavil that, "[i]nsofar as the * * * judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred." *Goosby v. Osser, supra* note 22, 409 U. S. at 517 n. 5, *citing Louisiana v. United States,* 380 U. S. 145, 154 (1965); *Brown v. Board of Education,* 349 U. S. 294, 300 (1955).

27. For example, despite the time limits imposed on agencies which receive FOIA requests, 5 U. S. C. § 552(6) (1970), the Commission took nine months from the date of appellants' initial request

the basis of this record, we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution.

The existence of a case or controversy having been established, we must next consider its merits. That is, we

27. (Cont'd.)
for the documents to issue its determination that the documents could legally be released. *See* p. 7 *supra*. Even more "curious" (to borrow the description of the District Court below) is the fact that the Commission, "having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining order." *Consumers Union of United States v. Consumer Product Safety Com'n*, *supra* note 7, 400 F. Supp. at 852. Also, as noted above, the Commission did not object to requests for further extensions. *See* p. 8 *supra*.

It is true that the temporary restraining orders were eventually replaced by a preliminary injunction, issuance of which was contested by the Commission. But it is the aftermath of the issuance of this preliminary injunction that constitutes perhaps the most disturbing aspect of the procedural history of this dispute. The Commission initially adopted the quite logical tack of filing an interlocutory appeal from the preliminary injunction. As recounted above, however, soon after filing the appeal *the Commission itself* filed a motion to have the appeal dismissed, and this motion was granted. *See* p. 9 *supra*. Since that time the Commission has evidently made not a single effort to have the District Court take any further action on the case or to have the Third Circuit consider on appeal the District Court's grant of the preliminary injunction. (We particularly stress the Commission's failure to pursue an appeal and its general inaction since the preliminary injunction was granted because these are uncontested facts that, obviously, were not before the District Court when it entered the order from which this appeal is taken.)

In large part, therefore, the prolonged delay and current legal stalemate in this dispute can be attributed to the Commission's inaction. Of course, absent lack of candor or other trifling with the court by the parties, questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court. *See, eg., Link v. Wabash R. Co.*, 370 U. S. 626, 633-634 (1962). However, the special nature of the manufacturers' suit in Delaware and its possible effect on Consumers Union and other potential FOIA plaintiffs require this court to pay closer than usual heed to the general background of this dispute and to the overall conduct of the parties.

must consider whether the Commission and the manufacturers or, alternatively, the appellants are correct in their assessment of the legal effect on this action of the Delaware judgment. At first glance appellees' position seems strong. The Delaware District Court preliminarily enjoined the Commission from releasing the contested documents, and that injunction has not been modified in any manner. It would thus appear that appellants' request may indeed be foreclosed.

Yet the correctness of this conclusion, toward which the Commission and the manufacturers urge us so enthusiastically, is not nearly as obvious as they would have us believe. The procedural history of the Delaware proceeding—as adduced by the District Court, as well as in the appellate briefs and at oral argument—is troubling and belies the apparent soundness of appellees' position. There is, first, the obvious and important fact that the Delaware District Court never did resolve the merits of the manufacturers' claim that the contested documents should not be released. Rather, the court limited itself to preliminary enjoining the Commsision from releasing the documents in dispute.[28] The opinion accompanying the injunctive order unmistakably confined itself to the propriety of relief *pendente lite*.[29] An order of that type is only "a conservative measure intended • • • to save all rights until the merits of the controversy can be definitely ascertained • • • . It is not an adjudication of rights in any proper sense of the term • • • [and] it does not follow that the

28. *GTE Sylvania, Inc. v. Consumer Product Safety Com'n*, *supra* note 5, 404 F. Supp. at 375.

29. The Delaware court found that irreparable harm would attend disclosure of the documents, 404 F. Supp. at 375, and that the manufacturers had presented a "*prima facie* case showing a reasonable probability" that divulgence would be unlawful. *Id.* at 389, *quoting Oburn v. Shapp*, 521 F. 2d 142, 148 (3d Cir. 1975).

final adjudication will be in accordance with the interlocutory order." [30]

Standing alone the preliminary injunction, despite its impact on the agency, could not bar the FOIA action instituted by appellants in the District of Columbia. It would, of course, weigh heavily in any decision as to which of the two suits ought, "giving regard to conservation of judicial resources and comprehensive disposition of litigation," [31] to be stayed or enjoined pending the outcome of the other.[32] Here, however, there is no occasion to engage in the balancing that would ordinarily attend such a situation, for nearly a year after entry of the preliminary injunction the Delaware court entered an order "closing out" the case with no further action planned.

While the "close-out" language employed by the Delaware court finds no parallel in either that court's rules or the Federal Rules of Civil Procedures [sic], it does evince an understanding—apparently shared by the parties before it—that the suit had run its course. No one implies that any intervening determination on the merits has converted the interlocutory relief into a permanent injunction; [33] such

30. *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895). *Accord, Public Service Com'n v. Wisconsin Telephone Co.*, 289 U. S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 405 F. 2d 1321, 1324 (D. C. Cir. 1968).

31. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). *Cf. Columbia Plaza Corp. v. Security National Bank*, 525 F. 2d 620, 627 (D. C. Cir. 1975). *See also Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976), and cases cited therein; 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2] at 736-739 (Moore & Lucas ed. 1975).

32. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., supra* note 31, 342 U. S. at 183-184; *Columbia Plaza Corp. v. Security National Bank, supra* note 31, 525 F. 2d at 627-628.

33. Neither does anyone contend that the hearing on preliminary relief was *sub silentio* consolidated with a hearing on the merits. See Rule 65(a)(2), FED. R. CIV. P. In view of the strictures placed upon such a practice, that is not surprising. *See, e.g.,*

other possible interpretations of the Delaware court's order as suggest themselves tend toward the conclusion that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped.

With that, the preliminary injunction is dead.[34] When there is no prospect of an adjudication of the merits, relief that purports to be temporary, pending such an adjudication, is obviously superfluous. Whether this "closing out" acknowledges an informal—or even tacit— "settlement" between the Delaware plaintiffs and the Commission we need not inquire, since if it did such a settlement would be void as against public policy.[35] Thus the preliminary injunction need hardly be considered an insuperable barrier to the suit at bar.

Besides the absence of a disposition on the merits, the Commission's conduct of the Delaware litigation is a second factor that makes us reluctant to accept, without more,

33. (Cont'd.)
Brooks v. Nacrelli, 415 F. 2d 272, 275 (3d Cir. 1969), *on remand*, 331 F. Supp. 1350 (E. D. Pa. 1971), *aff'd*, 473 F. 2d 955 (3d Cir. 1973); *Willits v. Richardson*, 497 F. 2d 240, 244 (5th Cir. 1974); *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F. 2d 1055, 1057 (7th Cir. 1972); *Dry Creek Lodge, Inc. v. United States*, 515 F. 2d 926, 935 (10th Cir. 1975). *But cf. Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 337 (3d Cir. 1974); *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972).

34. *See, e.g., Wickes Corp. v. Industrial Financial Corp.*, 493 F. 2d 1173, 1176 (5th Cir. 1974); *Rio Hondo Harvesting Corp. v. Johnson*, 293 F. 2d 426, 427 (5th Cir. 1961); *Heasley v. United States*, 312 F. 2d 641, 648-649 (8th Cir. 1963); *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903), *cert. denied*, 193 U. S. 671 (1904). *Cf.* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 at 427 (1973); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 at 65-86 (Moore & Lucas ed. 1975). *See also United States v. Professional Air Traffic Controllers Organization*, 449 F. 2d 1299, 1300 (3d Cir. 1971).

35. *Cf. Petkas v. Staats*, 501 F. 2d 887 (D. C. Cir. 1974).

the contention that the Delaware proceedings preclude appellants' suit here. As described above,[36] the Commission was, in several respects, less than vigilant in espousing its putative view that the requested documents should be disclosed.

Yet another, related reason for declining to give the Delaware judgment the preemptive effect that appellees argue it deserves is the absence from the Delaware proceedings of any party requesting disclosure. Not only were the appellants in this case not participants in that suit, neither was any other private party besides the manufacturers. Given the Government's peculiar approach to those proceedings, therefore, the pro-disclosure position was all but unrepresented. This important consideration further attenuates any claim that the preliminary injunction is binding on appellants here.

V. Conclusion

Accordingly, we remand this case to the District Court for the District of Columbia.[37] The issue on remand will be, quite simply, whether or not the documents should in fact be disclosed. In resolving this issue the District Court for the District of Columbia offers a peculiarly appropriate forum. The party that possesses the requested information (*i.e.*, the Commission), the parties that requested the information (Consumers Union and Public

36. *See* pp. 12-13 & note 27 *supra*.

37. Jurisdiction in the District Court is predicated on 5 U. S. C. § 552(a)(4)(B) (Supp. V 1975), which provides that under the FOIA:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. • • •

Citizens), and the parties that supplied the information (the manufacturers) are all joined in the suit and are ready to present their respective views on the merits. We find no constitutional or procedural bar to adjudication.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al., *Plaintiffs-Appellants,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants-Appellees.*

PETITION OF APPELLEE RCA CORPORATION FOR LEAVE TO LODGE EXHIBITS ATTACHED TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

To The Honorable Court:

Appellees, RCA moves this Honorable Court of Appeals to allow leave to lodge the attached exhibits (A-F with index) with its petition for rehearing. It is appellees belief that the Court is under a misapprehension concerning the status of the Delaware case and the exhibits attached hereto to RCA's petition will give a true status of the Delaware case and be of significant aid to this Court.

WHEREFORE, RCA's petition should be granted.

Respectfully submitted,

[Signatures of Counsel Deleted]

[Certificate of service and Exhibits B, D, E and F omitted in printing. Exhibits A and C follow.]

Exhibit A—Preliminary Injunction Entered by the Delaware District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152

GTE SYLVANIA, INC., et al., *Plaintiffs,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants.*

Preliminary Injunction

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

ORDERED

1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

2. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public

disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

Petition of Appellee RCA for Leave to Lodge Exhibits

Exhibit A—Preliminary Injunction Entered by the Delaware District Court

4. Copies of this preliminary injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: October 23, 1975.

/s/ JAMES L. LATCHUM
Chief Judge

Petition of Appellee RCA for Leave to Lodge Exhibits

Exhibit C—Minute Order Entered by the Delaware District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Minute Order Termination.

A preliminary injunction was issued in the above case on October 23, 1975 and since the parties do not now know whether further action is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes, therefore it is

ORDERED

1. The Clerk is hereby instructed to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes.

2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Dated: August 20, 1976.

/s/ JAMES L. LATCHUM
Chief Judge

Order of the Court of Appeals Granting Motions to Lodge Exhibits

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC. AND PUBLIC CITIZENS HEALTH RESEARCH GROUP, *Appellants,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges.*

Filed August 25, 1977

Order

Appellees, The Admiral Corporation et al, filed a motion to lodge exhibits on July 19, 1977. On July 18, 1977, appellees Aeronutronic Ford Corporation, et al, filed a motion to file an appendix to the petition for rehearing and suggestion for rehearing *en banc.* On July 19, 1977, appellees RCA Corporation filed a motion for leave to lodge exhibits attached to petition for rehearing *en banc.* On August 24, 1977, the Consumer Product Safety Commission moved to lodge certain documents in a related case. On consideration of the foregoing, it is

Order of the Court of Appeals Granting Motions to Lodge Exhibits

ORDERED by the Court that the aforesaid motions are granted.

Per Curiam

For the Court:

George A. Fisher, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

Order.

After considering the applications for rehearing filed by federal appellees, appellees Aeronutronic Ford Corporation, et al., appellees Admiral Corporation, et al., and appellee RCA Corporation, together with supporting memoranda, and appellants' response, it is

ORDERED by the Court that the applications for rehearing are denied for the reasons stated in the attached *per curiam*.

Per Curiam
For the Court
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals Denying Rehearing

PER CURIAM: On June 14, 1974 appellants sought production of the documents in suit here under the Freedom of Information Act. Instead of producing the documents after determining that the Act required production, appellee Consumer Product Safety Commission (CPSC) notified intervenors of their intention to do so. Whereupon intervenors filed injunction proceedings against the CPSC in various district courts, including the District of Delaware, seeking to prevent production. Subsequently, the District Court in Delaware issued a preliminary injunction precluding production. Later that court ordered the case closed with the preliminary injunction still pending.

This appeal is from the dismissal of appellants' FOIA case by the District Court here on the ground that no case or controversy existed since the CPSC agrees with appellants that the documents should be produced but is prevented from doing so by the preliminary injunction in the "closed" Delaware case. We reversed, holding that a case or controversy did indeed exist because CPSC continues to refuse to produce the documents.

Since our ruling we are advised that the Delaware case was marked "closed" for statistical reasons in that the case had been inactive for some time. Also, within a few days after our ruling, the Delaware case suddenly became active with a hearing in court, at which a date for trial on the merits was set. Appellants here, however, who have been attempting since 1974 to obtain production of the documents under FOIA, and against whom the Delaware litigation is directed, are not parties to the Delaware litigation. *See* Rule 19, Fed. R. Civ. P. Since all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA.

5 U. S. C. § 552(a)(4)(B) (Supp. IV, 1974).* Since the Act also provides that actions under it should be expedited, 5 U. S. C. § 552(a)(4)(D) (Supp. IV, 1974), at long last so be it.

So ordered.

* It is noteworthy that the Department of Justice has moved to transfer the Delaware case to the District of Columbia.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge*, WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

Order.

On consideration of the suggestions for rehearing *en banc*, and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestions are denied.

Per Curiam
For the Court:
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

Re: GTE Sylvania, Incorporated, et al. v. Consumers Union of the United States, et al., No. 77-508

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

MICHAEL RODAK, JR., Clerk

SECOND OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC. et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Filed December 22, 1978

Before WRIGHT, *Chief Judge*, and BAZELON, and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: At the core of this litigation [1] is appellants' challenge [2] under the Freedom of Information Act (FOIA)[3] to the Consumer Product

1. Our earlier decisions are cited *infra* notes 4 and 9.

2. Because of the grounds on which our previous decisions rested, it was unnecessary to deal with the problems that are squarely presented now.

3. Pub. L. No. 89-554, 80 Stat. 383 (1966), *as amended*, 5 U. S. C. § 552(a)(3)-(e) (1976).

Safety Commission's failure to disclose data concerning accidents attributable to the operation of television sets. When their cause was first before us, we reversed the District Court's ruling that no case or controversy was presented.[4] That determination had been premised on the Commission's acknowledged willingness to release the data save for a ban imposed thereon by a preliminary injunction awarded television manufacturers by the District Court for the District of Delaware in a reverse-FOIA suit involving the same information.[5] We held that the Delaware action, to which appellants were not parties, was no obstacle to their effort in the District Court here.[6] We reasoned that a preliminary injunction is designed merely to preserve the status quo ante pending final decision, and " 'is not an adjudication of rights in any proper sense of the term. . . .' "[7] Because the Delaware court had entered an order "closing out" the case before any final stage had been reached, we concluded that the Delaware proceeding was not "an insuperable barrier to the suit at bar."[8]

We later were informed that the Delaware action had not really been terminated, but that the "closing out" order was apparently a means merely of placating the periodic call for statistics reflecting judicial efficiency in processing caseloads.[9] In denying rehearing, we noted that appellants had still not been added as parties to the Delaware proceedings, and explained that "[s]ince all

4. *Consumers Union v. Consumer Prod. Safety Comm'n*, 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977).

5. See *id.* at 356, 561 F. 2d 354.

6. *Id.* at 359, 561 F. 2d at 357.

7. *Id.* at 358, 561 F. 2d at 356, quoting *United States Elec. Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895).

8. 182 U. S. App. D. C. at 358, 561 F. 2d at 356.

9. *Consumers Union v. Consumer Prod. Safety Comm'n*, 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977).

necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA."[10]

Our prior opinions spurred the manufacturers to renew vigorously their pursuit of a judgment on the merits in Delaware, and appellants made no effort to have the District Court here enjoin them from that course. And the Commission, at long last, moved in the Delaware court for a change of venue to the District of Columbia, but added no alternative motion to join the FOIA requesters in the Delaware case—in which, we are now told, their rights have been fully and finally adjudicated. The Delaware court denied transfer primarily on the ground that, though the Commission faced the possibility of inconsistent outcomes on the merits, "[t]he time for the Commission to have moved for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here."[11]

While a petition to the Supreme Court for a writ of certiorari in this case was pending, the Delaware court issued a permanent injunction.[12] The Supreme Court subsequently granted certiorari and remanded the case to us "for further consideration in light of the permanent injunction."[13] Thus we are now brought face-to-face with the issue we had earlier reserved: Does a judgment in

10. *Id.*

11. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 438 F. Supp. 208, 212 (D. Del. 1977). The court noted that "the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia." *Id.* at 211.

12. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 443 F. Supp. 1152 (D. Del. 1977), *appeal pending*, No. 78-1328 (3d Cir.).

13. *GTE Sylvania, Inc. v. Consumers Union*, 434 U. S. 1030, 98 S. Ct. 761, 54 L. Ed. 2d 778 (1978).

favor of information-suppliers in a reverse-FOIA suit bar requesters not parties thereto from litigating their contention that the Freedom of Information Act mandates disclosure? [14] The answer, we think, becomes clear once one investigates the interrelationship of the Act and reverse-FOIA suits in light of traditional principles governing preclusion of subsequent litigation.

I. The Rationales for FOIA and Reverse-FOIA Suits.

Before the Freedom of Information Act was adopted, official dissemination of information was frequently marked by caprice,[15] and suits to obtain information or

14. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 359, 561 F. 2d at 357. After the remand, we called upon the parties for, and they submitted, supplemental memoranda setting forth their views as to the course the court should take, addressing particularly the question stated in text.

15. Section 3(c) of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 238 (1946), which the Freedom of Information Act replaced, provided that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." This section was perceived as "not intended to open up Government files for general inspection," Attorney General's Manual on Administrative Procedure Act 25 (1947), and agency responses to requests for information often evidenced an appreciation of secrecy for secrecy's sake. See S. Rep. No. 813, 89th Cong., 2d Sess. 3-5 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966); *EPA v. Mink*, 410 U. S. 73, 79, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119, 127-128 (1973); *Getman v. NLRB*, 146 U. S. App. D. C. 209, 217-218, 450 F. 2d 670, 678-679, *stay denied*, 404 U. S. 1204, 92 S. Ct. 7, 30 L. E. 2d 8 (1971); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 435-437 (1965). The breadth of agency discretion under § 3(c) was in no way curtailed by the courts, see, *e.g.*, *FCC v. Schreiber*, 381 U. S. 279, 293, 85 S. Ct. 1459, 1469, 14 L. Ed. 2d 383, 393 (1965); *cf. Appeal of SEC*, 226 F. 2d 501, 517-519 (6th Cir. 1955); but *cf. Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D. D. C. 1963), and that section had little practical effect on prior law. *Cf. United States ex rel. Stowell v. Deming*, 57 App. D. G. 223, 224, 19 F. 2d 697, 698, *cert. denied*, 275 U. S. 531, 48 S. Ct. 28, 72 L. Ed. 419 (1927).

to forestall its release met with "far from uniform" [16] judicial treatment.[17] The Act was intended to rationalize agency disclosure policies [18] by providing a mechanism for balancing the public's "right to know" against the agency's interest in preserving confidentiality.[19] If a court finds that the Act applies to material for which a request has been properly made,[20] that is the end of the matter; the

16. 1 K. Davis, Administrative Law Treatise § 3.13, at 227 (1958).

17. See cases cited *supra* note 15. See also the many cases dealing with the propriety of agency disclosure *sua sponte* or in the course of agency proceedings. *E.g.*, *FCC v. Schreiber*, *supra* note 15; *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U. S. 56, 59 S. Ct. 409, 83 L. Ed. 483 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); *FCC v. Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd on other grounds*, 241 F. 2d 81 (4th Cir.), *cert. denied*, 353 U. S. 957, 77 S. Ct. 863, 1 L. Ed. 2d 908 (1957). See generally *Appeal of SEC*, *supra* note 15, 226 F. 2d at 517-519 and cases there cited; J. Chamberlain, N. Dowling & P. Hays, The Judicial Function in Administrative Agencies 112-120 (1942); 1 K. Davis, Administrative Law Treatise § 3.13 (1958 & 1970 Supp.); Rourke, *Law Enforcement Through Publicity*, 24 U. Chi. L. Rev. 225, 242-247 (1957).

18. See, *e.g.*, S. Rep. No. 813 *supra* note 15, at 3:

> It is the purpose of the present bill . . . to establish a general policy of full agency disclosure unless information is exempted. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting informational policies.

19. *Id.* See also *EPA v. Mink*, *supra* note 15, 410 U. S. at 79-80, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128.

20. When no "request for identifiable records" has been made, the statute is not activated. 5 U. S. C. § 552(a)(3) (1976); see S. Rep. No. 813, *supra* note 15, at 2; *cf.*, *e.g.*, *Nader v. Volpe*, 151 U. S. App. D. C. 90, 93 n. 26, 466 F. 2d 261, 264 n. 26, 18 A. L. R. Fed. 595 (1972); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 131 U. S. App. D. C. 331, 341 n. 15 (1968) (concurring opinion). See also *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 555 F. 2d 82, 93-94 (3d Cir. 1977). But see *Pennzoil Co. v. FPC*, 534 F. 2d 627, 630 (5th Cir. 1976); *Continental Oil Co. v. FPC*, 519 F. 2d 31, 36 (5th Cir. 1975), *cert. denied*, 425 U. S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976); *Union Oil Co. v. FPC*, 542 F. 2d 1036, 1045 (9th Cir. 1976).

material *must* be disclosed,[21] for the Act effectuates a congressional judgment that in those circumstances no public or private interest in secrecy outweighs the benefits attending public access.[22] Moreover, in determining whether the Act is operative, the legislative command that disclosure be the rule and exemptions be narrowly construed [23] must be sedulously observed. But Congress in the same breadth specified classes of information to which the Act—and its policy of openness—"do[] not apply." [24] When a court finds that requested material

21. *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 147-148, 95 S. Ct. 1504, 1515, 44 L. Ed. 2d 29, 45-46 (1975).

22. S. Rep. No. 813, *supra* note 15, at 5-6; see, *e.g.*, *Getman v. NLRB*, *supra* note 15, 146 U. S. App. D. C. at 217-219, 450 F. 2d at 678-680; *Soucie v. David*, 145 U. S. App. D. C. 144, 154, 448 F. 2d 1067, 1077 (1971). See also *Department of the Air Force v. Rose*, 425 U. S. 352, 379 n. 17, 96 S. Ct. 1592, 1607 n. 17, 48 L. Ed 2d 11, 31 n. 17 (1976). See generally K. Davis, Administrative Law of the Seventies § 3A.6, at 61 (1976).

23. See *Department of the Air Force v. Rose*, *supra* note 22, 425 U. S. at 361, 96 S. Ct. at 1599-1600, 48 L. Ed. 2d at 21, citing *EPA v. Mink*, *supra* note 15, 410 U. S. at 79, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128; *Vaughn v. Rosen*, 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973), *cert. denied*, 415 U. S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), *aff'd after remand*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142, 28 A. L. R. Fed. 623 (1975); *Soucie v. David*, *supra* note 22, 145 U. S. App. D. C. at 157, 448 F. 2d at 1080.

24. 5 U. S. C. § 552(b) (1976); S. Rep. No. 813, *supra* note 15, at 3; see, *e.g.*, *Administrator v. Robertson*, 422 U. S. 255, 261, 95 S. Ct. 2140, 2145, 45 L. Ed. 2d 164, 170 (1975); *NLRB v. Sears, Roebuck & Co.*, *supra* note 21, 421 U. S. at 137, 95 S. Ct. at 1510, 44 L. Ed. 2d at 39; *EPA v. Mink*, *supra* note 15, 410 U. S. at 74, 93 S. Ct. at 830, 35 L. Ed. 2d at 125. Since the Act is "not a withholding statute but a disclosure statute," S. Rep. No. 813, *supra* note 15, at 5; see S. Rep. No. 584, 93d Cong., 2d Sess. 6 (1974); H. R. Rep. No. 1419, 92d Cong., 2d Sess. 7 (1972), the mere fact that information falls within one of its exemptions does not of itself outlaw disclosure. See *Planning Research Corp. v. FPC*, 181 U. S. App. D. C. 33, 36-37 n. 4, 555 F. 2d 970, 973-974 n. 4 (1977), citing S. Rep. No. 584, *supra*, at 6 and *Charles River Park "A", Inc. v. HUD*, 171 U. S. App. D. C. 286, 293, 519 F. 2d 935, 942 (1974) and K. Davis, Administrative Law of the Seventies § 3A.5, at 58-61 (1976) and K. Davis, Administrative Law Treatise

falls into one of these categories, and resultantly that its divulgence is not compelled by the Act, the propriety of voluntary disclosure by the agency must hinge on reconciliation with such other law as is pertinent—whether statute, regulation, the administrative "common law" or general principles of equity.[25]

Some of these residual legal rules may endow private parties with legally cognizable interests in the confidentiality of exempted information; others may bestow on some a greater entitlement to information than the Act itself gives the general public.[26] Since the agency's pur-

24. (Cont'd.)
§ 3A.5, at 122 (1970 Supp.); *Chrysler Corp. v. Schlesinger*, 565 F. 2d 1172, 1185 (3d Cir. 1977), *cert. granted*, 435 U. S. 914, 98 S. Ct. 1466, 55 L. Ed. 2d 504 (1978); *Superior Oil Co. v. FERC*, 563 F. 2d 191, 204 (5th Cir. 1977); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit*, 55 Texas L. Rev. 587, 598-600 (1977); *cf.* Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. 1, 5-6 (1976); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1158-1159 (1975); Comment, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. L. Rev. 995, 1010-1011 (1976). See also *Associated Dry Goods Corp. v. EEOC*, 419 F. Supp. 814, 821 (E. D. Va. 1976). But *cf. Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U. S. 924, 97 S. Ct. 2199, 53 L. Ed. 2d 239 (1977); *McCoy v. Weinberger*, 386 F. Supp. 504, 508 (W. D. Ky. 1974).

25. See, *e.g.*, *Planning Research Corp. v. FPC*, *supra* note 24, 181 U. S. App. D. C. at 36-37 n. 5, 555 F. 2d at 973-974 n. 5, quoting K. Davis, Administrative Law Treatise § 3A.5, at 122 (1970 Supp.); *Charles River Park "A", Inc. v. HUD*, *supra* note 24, 171 U. S. App. D. C. at 140-141, 519 F. 2d at 941-942; *Chrysler Corp. v. Schlesinger*, *supra* note 24, 565 F. 2d at 1192; *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, 542 F. 2d at 1197-1198; *GSA v. Benson*, 415 F. 2d 878, 880 (9th Cir. 1969). But *cf. Babcock & Wilcox Co. v. Rumsfeld*, 70 F. R. D. 595, 601 (N. D. Ohio 1976).

26. Compare, *e.g.*, *United States v. Nixon*, 418 U. S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) with *EPA v. Mink*, *supra* note 15, 410 U. S. at 86-88, 93 S. Ct. at 835-836, 35 L. Ed. 2d at 131-133.

poses will only coincidentally correspond with those of nongovernmental parties, it would be folly to entrust these often-critical private interests[27] to unreviewable bureaucratic discretion. This court has accordingly held that when an agency asserts its intention to comply with a demand for information, parties who would be aggrieved by compliance may sue for a declaration whether that release would be lawful.[28] But such litigants must

27. At least one reverse-FOIA action has been brought by individuals seeking to prevent disclosure to business concerns of confidential information about them. *Sonderegger v. United States Dep't of Interior*, 424 F. Supp. 847 (D. Idaho 1976) (request of claim files on each victim in Teton Dam disaster). Many other FOIA cases, mostly turning on the scope of 5 U. S. C. § 552(b)(6) (1976), indicate that requesters may desire information about "little people." *E.g., Department of the Air Force v. Rose, supra* note 22, 425 U. S. at 373-376, 96 S. Ct. at 1606-1607, 48 L. Ed. 2d at 28-30 (Air Force Academy disciplinary records); *Rural Housing Alliance v. United States Dep't of Agriculture*, 162 U. S. App. D. C. 122, 126, 498 F. 2d 73, 77 (1974) ("information regarding marital status, legitimacy of children, identity of fathers . . . , medical condition, welfare payments, alcoholic consumption, family fights, and so on"). *Ackerly v. Ley*, 137 U. S. App. D. C. 133, 136, 420 F. 2d 1336, 1339 (1967) (medical records); *Wine Hobby U. S. A., Inc. v. Internal Revenue Serv.*, 502 F. 2d 133, 136-137 (3d Cir. 1974) (names, addresses, family status, and personal activities within the home); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D. D. C. 1977), *aff'd*, No. 77-1504 (D. C. Cir. Apr. 18, 1977) (names and addresses of former military officers who retired with a disability); *Columbia Packing Co., Inc. v. United States Dep't of Agriculture*, 417 F. Supp. 651, 654 (D. Mass. 1976), *aff'd*, 563 F. 2d 495 (1st Cir. 1977) ("a detailed synopsis of each individual's career within the [government], data about family relationships, financial information and medical records"); *cf. Ditlow v. Schultz*, 170 U. S. App. D. C. 352, 517 F. 2d 166 (1975). Surely these individuals should not be without recourse to judicial review of agency action so deeply affecting their privacy. See generally, Hulett, *Privacy and the Freedom of Information Act*, 27 Ad. L. Rev. 275 (1975); Project, *supra* note 24, 73 Mich. L. Rev. at 1161-1162, 1336-1338.

28. *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 141, 519 F. 2d at 942; see *Planning Research Corp. v. FPC, supra* note 24, 181 U. S. App. D. C. at 40-41, 555 F. 2d at 977-978. See also *Sears, Roebuck & Co. v. GSA*, 180 U. S. App. D. C. 202, 204-205, 553 F. 2d 1378, 1380-1381 (1977).

first pass through the needle's eye of the Freedom of Information Act,[29] for if the Act calls for disclosure they have, of course, no right whatsoever to confidentiality.[30] Only if the Act does not govern need the court examine other sources of law—which may prohibit dissemination, give the agency judicially reviewable or unreviewable discretion to release or retain, or even mandate disclosure, depending on the circumstances.[31]

Reverse-FOIA suits therefore are no blight upon the landscape of the law, but the propriety of their role in any scenario must be carefully considered. Enforcement of such rights of confidentiality as federal law might otherwise recognize must not be allowed to choke the free flow of data contemplated by Congress in the Freedom of Information Act. Surely such an obstruction would be interposed if a judgment adverse to the agency in a reverse-FOIA action were permitted to bar later FOIA suits for the documents in question when no one interested in obtaining the material was a party to the earlier litigation. In our view, no such preemption is warranted, as this case tellingly exemplifies.

II. Theories for Preclusion of Subsequent FOIA Suits

Federal courts in different jurisdictions may sometimes reach conflicting conclusions on the duties of an ad-

29. *Sears, Roebuck & Co. v. GSA, supra* note 28, 180 U. S. App. D. C. at 205, 553 F. 2d at 1381, citing *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 291-292 n. 4, 294 n. 10, 519 F. 2d at 940 n. 4, 941 n. 10 and *Westinghouse Elec. Corp. v. Schlesinger, supra* note 24, 542 F. 2d at 1208 n. 57.

30. See note 22 *supra*.

31. See cases cited *supra* note 23; *GSA v. Benson, supra* note 25, 415 F. 2d at 880, (alternative holding that agency is bound by regulation specifying that even if requested material is exempt, it should be released absent a compelling reason for nondisclosure); *cf.* S. Rep. No. 584, *supra* note 24, at 6; H. R. Rep. No. 1419, *supra* note 24, at 7 (approving regulations similar to those invoked in *Benson*); Drachsler, *supra* note 24, 28 Ad. L. Rev. at 2, 9-11.

ministrative agency, but normally without placing it in an impossible dilemma or bringing on a direct clash of judicial power. A serious conundrum, however, arises when, as here, the subject matter is information and the dispute is over whether it should be disclosed to the public. Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere. Consequently, the first court to decide—in either a FOIA or a reverse-FOIA suit—will have pronounced a judgment that might reach across the Nation, or, on the other hand, might not have any practical effect even in its own jurisdictional domain.

That is exactly the situation here. The Delaware proceeding began, and the Commission was temporarily enjoined, before the appellant-requesters filed their own action in the District of Columbia seeking disclosure. By the time appellants sued, the District Court here knew that should the litigation before it continue, a decision contrary to that of the Delaware court might be reached, and that the Commission could not possibly comply with each of the conflicting orders.

Thus focused, the issue is the proper response of the court chronologically second. We earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position [32] for the reasons then stated.[33] That still leaves other alternatives—dismissal

32. See *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

33. In the Supreme Court, the Commission stated, contrary to its argument here, that it had become "persuaded . . . that a case

on a theory of *stare decisis*, collateral estoppel or comity, or continuation of the suit in some manner. For more than ample reason, we have chosen the latter course.

A. *Stare Decisis.*

We surely do not gainsay that "the doctrine of stare decisis is still a powerful force in our jurisprudence." [34] So, a court resolving a FOIA claim may choose to defer to a previous judicial decision that the Act does or does not apply to particular documents,[35] whether the prior action sought disclosure or restraint. It has not, however, been our experience that federal judges are either careless or timorous. The notion that any would defer on *stare decisis* grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment.[36]

33. (Cont'd.)
or controversy, within the meaning of Article III, exists between the requesters and the Commission." Brief for Federal Respondents in Opposition to Petition for a Writ of Certiorari, at 5, *GTE Sylvania, Inc. v. Consumers Union, supra* note 13.

34. *United States v. Maine*, 420 U. S. 515, 527, 95 S. Ct. 1155, 1161, 43 L. Ed. 2d 363, 371 (1975).

35. See generally, Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N. C. L. Rev. 123 (1977). But *cf. Robertson v. Department of Defense*, 402 F. Supp. 1342, 1346-1347 (D. D. C. 1975).

36. See *City Stores Co. v. Lerner Shops of District of Columbia, Inc.*, 133 U. S. App. D. C. 311, 315, 410 F. 2d 1010, 1014 (1969) ("[d]ecisions of district courts and other courts of appeal are, of course, not binding on us and are looked to only for their persuasive effect"; "[i]f they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number"); *Watson v. Allen*, 103 U. S. App. D. C. 5, 10, 254 F. 2d 342, 347 (1958), *later appeal*, 107 U. S. App. D. C. 25, 274 F. 2d 87 (1959), (decisions of other courts of appeals "are persuasive and entitled to deference but are not authoritatively binding"). See generally, Vestal, *supra* note 35, 55 N. C. L. Rev. at 130-136. But see Comment, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 85 Yale L. J. 1219 (1978).

B. *Collateral Estoppel.*

Furthermore, the doctrine of collateral estoppel, which does bind parties to a previous suit to such determinations of material issues as are encompassed in the judgment,[37] only rarely precludes nonparties from litigating the same issues afresh.[38] If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts.[39]

The only parties here who were litigants in Delaware are the Consumer Product Safety Commission and the manufacturers who sought to prevent disclosure of materials that the Commission was prepared to turn over to appellants. An agency's interests in FOIA suits of either

37. See, *e.g.*, *Nixon v. Richey*, 168 U. S. App. D. C. 172, 180 n. 75, 513 F. 2d 430, 438 n. 75 (1975), and cases cited therein; *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1319 (D. D. C. 1973), *aff'd*, 166 U. S. App. D. C. 274, 510 F. 2d 654 (1974). See generally, Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964).

38. See, *e.g.*, *Sea-Land Servs., Inc. v. Gaudet*, 414 U. S. 573, 593-595, 94 S. Ct. 806, 819, 39 L. Ed. 2d 9, 25-26 (1974), citing, *inter alia*, *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U. S. 313, 320-327, 91 S. Ct. 1434, 1439-1442, 28 L. Ed. 2d 788, 795-799 (1971); Vestal, *supra* note 37, 50 Iowa L. Rev. at 63-64; *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 855-856 (1952). See also *Hansberry v. Lee*, 311 U. S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940). We are cognizant of isolated decisions of lower federal courts advancing bold new rules for preclusion of nonparties, which have been hailed by commentators as a sign of things to come. See generally McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707 (1976); Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. Calif. L. Rev. 357 (1974); Vestal, *Claim Preclusion and Parties in Privity:* Sea-Land Services v. Gaudet *in Perspective*, 60 Iowa L. Rev. 973 (1975). We take no view on these developments, for they do not apply to the situation under discussion here, in which by no means did appellants have a "vicarious day in court." Note, *Collateral Estoppel of Non-parties*, 87 Harv. L. Rev. 1485, 1500 (1974).

39. See *Wolfe v. Froehlke*, *supra* note 37, 358 F. Supp. at 1319; *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346-1347.

stripe diverge markedly from private interests,[40] and raise serious doubt whether the agency could ever be deemed to represent members of the public. Indeed, congressional appreciation of that divergence underlies the Act. The institutional predilections that distinguish the agency's position from the citizens argue against permitting the Commission to do via litigation what it may not do by agreement[41]—to bar applicants from information to which the Act mandates access. Far less do they justify departure from the rule, articulated in the milieu of antitrust enforcement, that "just as the Government is not bound by . . . litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation."[42]

40. As an institutional matter, the agency's policy goals will best be served if it is completely free to expend or conserve the power of its knowledge. See, *e.g.*, Rourke, *supra* note 17, 24 U. Chi. L. Rev. 231-233. One commentator has noted that "[i]t may be bad for appearances in a period of 'openness' and 'honesty' for an agency to refuse disclosure. . . ." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law., 1125, 1134 (1975); accord, Note, *Protection from Government Disclosure—The Reverse FOIA Suit*, 1976 Duke L. J. 330, 359 (1976), *cf.* Comment, *supra* note 24, 70 Nw. U. L. Rev. at 998-999. On the other hand, self-interest may often move the agency to keep secret information that, if revealed, would embarrass it or frustrate its regulatory objectives. See S. Rep. No. 813, *supra* note 15, at 3; H. R. Rep. No. 1497, *supra* note 15, at 5-6.

41. *Petkas v. Staats*, 163 U. S. App. D. C. 327, 329, 501 F. 2d 887, 889 (1974).

42. *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 690, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604, 610 (1961); see *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F. 2d 39, 52 (5th Cir. 1974), *cert. denied*, 419 U. S. 110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975); *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346-1347; *cf. City of Chicago v. General Motors Corp.*, 332 F. Supp. 285 (W. D. Ill. 1971), *aff'd*, 467 F. 2d 1262 (1972). But *cf. Proctor & Gamble Co. v. Byers Transp. Co., Inc.*, 355 F. Supp. 547, 558 n. 18 (W. D. Mo. 1973).

We have no quarrel with the proposition that in appropriate circumstances the Government may represent private parties in a judicial proceeding and that that suffices to bar those represented

Nor can the agency's role in reverse-FOIA litigation be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. At the outset, the clash of purposes would render the bureaucracy suspect as a representative of any class composed of FOIA requesters.[43] Even passing that, when—as in the present circumstances—no class has been convened, no preclusive effect can possibly follow, and the public's right to know remains secure.

C. *Comity.*

That brings us lastly to comity, here reflected in the principle that "[o]rdinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed

42. (Cont'd.)
from collaterally attacking the resulting judgment. See *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F. 2d 84, 91-101 (5th Cir.), *cert. denied*, 434 U. S. 832, 98 S. Ct. 117, 54 L. Ed. 2d 93 (1977); Restatement (Second), of Judgments, § 85, comment *d* at 61-62 (Tent. Draft No. 2, 1975). But to accept a governmental agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent: The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information. See also note 40 *supra*.

43. To view the Commission as litigant of the requesters' rights in their stead "is to attribute to [it] a power that it cannot be said that [it] has assumed to exercise, and a responsibility which, in view of [its] interests[,] it does not appear that [it] could rightly discharge." *Hansberry v. Lee*, *supra* note 38, 311 U. S. at 46, 61 S. Ct. at 120, 85 L. Ed. at 29. "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45, 61 S. Ct. at 119-120, 85 L. Ed. at 29.

with it without interference from other courts under suits subsequently instituted."[44] Though we have not the smallest quarrel with that time-honored dogma, it should not be permitted to hold sway outside situations in which it was designed to apply. Created to assure judicial efficiency and to reflect abiding respect for other courts,[45] the doctrine surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent.

In fact, though perhaps subconsciously at times, the courts have not allowed comity to be debased in such a fashion. The decisions invoking the principle involve circumstances in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter.[46] When everyone with an interest

44. *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, 140 F. 2d 47, 49 (4th Cir. 1944).

45. See *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483, 498 (1976); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 409, 525 F. 2d 620, 626 (1975).

46. *E.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U. S. 180, 181, 72 S. Ct. 219, 220, 96 L. Ed. 200, 202 (1952) (parties to subsequent suit were both involved in first action); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 411, 525 F. 2d 620, 628 (1975) (all parties to subsequent suit were involved in first action); *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951, 84 S. Ct. 968, 11 L. Ed 2d 971 (1964) (same plaintiff in both suits; substantially the same parties altogether); *Food Fair Stores, Inc. v. Square Deal Market Co.*, 88 U. S. App. D. C. 176, 177, 187 F. 2d 219, 220 (1951) (same parties and issues); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197, 1202-1203 (2d Cir. 1970) (same parties and issues); *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F. 2d 1012, 1014 (2d Cir. 1944) (second suit by defendant in prior proceeding against plaintiffs in that first action must be enjoined, but suit on same issue and subject matter against corporation that was not party to first suit must be allowed to continue); *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, *supra* note 44, 140 F. 2d at 49 (same parties in both suits); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F. 2d 403, 405 (5th Cir. 1971) (de-

could have had his claim resolved in one court, it would be senseless to allow some of the parties to initiate concurrent litigation over the same dispute. But that is not this case. Some—at least appellants—with a stake in the controversy were not before the Delaware court, and accordingly the principle of comity is inapplicable.[47] Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by the Act[48] and the Constitution,[49] to have their claims adjudicated.

III. Accommodating FOIA and Reverse-FOIA Suits.

The sum of the foregoing is that none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency. One obvious consequence is that federal agencies that are prey to reverse-FOIA suits may

46. (Cont'd.)
fendants in first suit brought subsequent action); *Martin v. Graybar Elec. Co.*, 266 F. 2d 202, 204 (7th Cir. 1959) (both suits involved the same parties and issues); *American Chem. Paint Co. v. Thompson Chem. Corp.*, 244 F. 2d 64, 65-66 (9th Cir. 1957) (same plaintiffs in all suits); *O'Hare Internat'l Bank v. Lambert*, 459 F. 2d 328, 330 (10th Cir. 1972) (identical actions brought by same party). See also, *e.g.*, *Will v. Calvert Fire Ins. Co.*, — U. S. —, —, 98 S. Ct. 2552, 2555, 57 L. Ed. 2d 504, 508 (1978) (same parties and issue in state and federal court suits); *Colorado River Water Conservation Dist. v. United States*, *supra* note 45, 424 U. S. at 806, 96 S. Ct. at 1240-1241, 47 L. Ed. 2d at 491 (same); *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 494-495, 62 S. Ct. 1173, 1175-1176, 86 L. Ed. 1620, 1625 (1942) (same); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 263, 31 S. Ct. 11, 13-14, 54 L. Ed. 1032, 1038-1039 (1910) (plaintiff in subsequent state suit was a corporation utilized merely as a device by defendant in first federal suit).

47. *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346, citing *Great N. Ry. Co. v. National R. R. Adjustment Bd.*, 422 F. 2d 1187, 1193 (7th Cir. 1970).

48. See 5 U. S. C. § 552(a)(4)(B) (1976).

49. See text *infra* at notes 60-61.

by that token find themselves subject to the possibility of inconsistent judgments. Threats of that nature are not unprecedented, however, and there are procedural devices aplenty designed to avoid the hazard of conflicting obligations.[50] Resort to them in the present context, moreover, would have brought about representation of all interests before the court that first addressed the merits, and thereby would have eliminated the problem completely.

Another consequence is that reverse-FOIA plaintiffs may find that, to prevent judgments in their favor from becoming nugatory, they must join in their lawsuits anyone whose request for information quickened the submitter's controversy with the agency[51]—or perhaps even, by way of a defendant class action, all those who likely may subsequently make such requests. That, too, can only be salutary, for it will assure that the public's interest will be represented by at least one of its own. It will also relieve courts of the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy.[52]

The manufacturer-plaintiffs could have named appellant-requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters.[53]

50. See, *e.g.*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 155 (D. D. C. 1976) (transfer and consolidation of FOIA and reverse-FOIA suits); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D. D. C. 1973) (reverse-FOIA advocate permitted to intervene as of right in FOIA suit). See also text *infra* at notes 53-56.

51. Joining the requester may constrain the reverse-FOIA plaintiff's choice of venue. See 28 U. S. C. A. § 1391(e) (1977 Supp.). See also 5 U. S. C. § 552(a)(4)(B) (1976), discussed in notes 66 and 71 *infra*.

52. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

53. See *United States v. Trucking Employers, Inc.*, 75 F. R. D. 682, 686-687 (D. D. C. 1977); Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative

They did not. The Commission, with some creativity, could have filed an interpleader counterclaim and joined the requesters on the theory that otherwise the Commission might be exposed to multiple accountability and that, in a dispute over disclosure, information is an indivisible res over which the parties contest.[54] It did not. At the very least, the Commission could have urged that the requesters were parties whose joinder was required under Civil Rule 19.[55] But no consideration was given to the mandates of that rule,[56] though, as we now elucidate, its applicability could hardly have been questioned.

If, as the manufacturers and the Commission assert, the Delaware reverse-FOIA suit so affected appellants' interest in disclosure of the information sought that they are now barred from litigating it in the District Court here, the Delaware action certainly could have been said, in the words of Rule 19, "as a practical matter [to] impede [their] ability to protect that interest or . . . [to] leave [the agency] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [appellants'] claimed interest." [57]

53. (Cont'd.)
parties on behalf of all" if certain prerequisites are met). See generally Wolfson, *Defendant Class Actions,* 38 Ohio St. L. J. 459 (1977); Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630 (1978).

54. See Fed. R. Civ. P. 22; Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966); *cf. Gauss v. Kirk,* 91 U. S. App. D. C. 80, 83, 198 F. 2d 83, 86 (1952).

55. Fed. R. Civ. P. 19.

56. Indeed, though any court may—and should, if justified—examine the issue of Rule 19 *sua sponte,* the Commission refused to consent to the filing of the requesters' amicus brief raising the question on the appeal to the Third Circuit of the Delaware court's ruling. See note 12 *supra.* The Third Circuit granted leave to file the brief, however.

57. Fed. R. Civ. P. 19(a). The possible difficulty that reverse-FOIA plaintiffs might not know the identities of all present or future requesters can be ameliorated by joining any known requesters as representatives of a defendant class. See note 53 *supra.*

Indeed, the concept of joinder was created to resolve the problem of conflicting exercise of equity jurisdiction.[58] Rule 19(b) states the considerations that must guide a determination whether one described by Rule 19(a) must be regarded as so indispensable that the litigation must be dismissed. Those factors include

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In our view, those factors, had anyone in the Delaware action paused to look at them, surely demanded dismissal of the manufacturers' Delaware suit, or at least an injunction shaped to impact to the smallest possible extent upon the absent requesters' interest.

Joinder of the requesters would have been the better course, for it would have avoided the duplicative litigation in which we now are unfortunately entangled, but it was not the only solution. A well-crafted judgment in Delaware could have steered clear of any embarrassment to appellants' claim. Indeed, the inherent tension between

58. See *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U. S. 102, 120, 88 S. Ct. 733, 743-744, 19 L. Ed. 2d 936, 950-951 (1968). Rule 19 also helps "to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits." *Minnesota v. Northern Sec. Co.,* 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499, 516 (1902).

reverse-FOIA and FOIA suits could often be mitigated by a rule that, unless the party resisting disclosure joins in his reverse-FOIA suit those seeking release, any injunction therein must be drafted to halt only voluntary disclosure by the agency, and to leave unaffected the requesters' right to seek a subsequent judicial determination that the Act mandates disclosure.[59]

IV. Conclusion.

Appellant requesters were not made parties to the Delaware action, and the effect of that omission on this litigation is, to us, indisputable. A judgment cannot bind those who were not before the court either in person or through some sort of representative.[60] As the Supreme Court has declared, in dealing with situations where "a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties . . . , no Court can adjudicate directly upon a person's right, without the party being

59. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 112 n. 10, 88 S. Ct. at 739, n. 10, 19 L. Ed. 2d at 946 n. 10 (the pertinent questions are "[c]an the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery"). We need not reach the question whether by similar reasoning requesters must always join submitters as defendants in their FOIA suits, for appellants here have done so in their complaint.

60. *Hansberry v. Lee, supra* note 38, 311 U. S. at 40-41, 45, 61 S. Ct. at 117-118, 119-120, 85 L. Ed. at 26-27, 29; see *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered"); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., supra* note 46, 342 U. S. at 186, 72 S. Ct. at 222, 96 L. Ed. at 204 ("[i]f the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere").

either actually or constructively before the Court."[61] This basic tenet of due process can hardly be circumvented through the ritualistic invocation of "comity." The manufacturers have no valid objection to relitigation of disclosure of this information, "for clearly the plaintiff [in the earlier suit], who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtain[ed] against them."[62] Nor can the Commission legitimately bemoan the threat of inconsistent obligations since it never attempted to foreclose that possibility by seeking the joinder of appellants in Delaware.[63]

61. *Mallow v. Hinde*, 25 U. S. (12 Wheat.) 193, 198, 6 L. Ed. 599, 600 (1827), quoted with approval in *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 122, 88 S. Ct. at 744, 19 L. Ed. 2d at 952. See also *Western Union Tel. Co. v. Pennsylvania*, 368 U. S. 71, 74-75, 82 S. Ct. 199, 201, 7 L. Ed. 2d 139, 142-143 (1961) (forced relinquishment of property interest without assurance that holder will not be held liable again to another in another court violates due process, "and, of course, New York's claims could not be cut off where New York was not heard as a party").

62. *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 111, 88 S. Ct. at 739, 19 L. Ed. 2d at 946; see *Boles v. Greenville Housing Auth.*, 468 F. 2d 476, 479 (6th Cir. 1972) ("[a]ny hardship suffered . . . is attributable to their own failure to bring [an interested person] into the case as a party"). It is no answer to say that a plaintiff normally is allowed to choose how to write his complaint:

> The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

Schutten v. Shell Oil Co., 421 F. 2d 869, 873 (5th Cir. 1970).

63. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[a]fter trial, however, if the defendant has failed to assert

The only factor even remotely capable of preventing appellants from prosecuting their FOIA suit toward a result contrary to the broad Delaware reverse-FOIA injunction is their failure to intervene in the proceeding there.[64] We believe, however, that appellants, and perhaps information-requesters generally, should not suffer from bypasses of this sort. To decide otherwise would force them to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester.[65] Congress specified the sites

63. (Cont'd.)
this interest [against inconsistent relief], it is quite proper to consider it foreclosed"). Had the Commission raised the issue in a timely fashion, the Delaware court expectably would either have ordered joinder, modified the relief ultimately granted or dismissed the action. The Supreme Court has instructed that if "[a]mong the unpleasant possibilities entailed by proceeding [is] the likelihood that the defendant might find itself subject to directly conflicting injunctive orders . . . 'the court must refuse to exercise jurisdiction . . . or become the instrument of injustice.'" *Id.* at 123, 88 S. Ct. at 745, 19 L. Ed. 2d at 952, quoting *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 56 U. S. (15 How.) 233, 246, 14 L. Ed. 674, 681 (1854).

64. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, *supra* note 58, 390 U. S. at 114, 88 S. Ct. at 740, 19 L. Ed. 2d at 947-948 (reversing this question). Compare *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 Harv. L. Rev. 874, 882-883 (1958) with *id.* at 884-885. Preclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation.

65. For example, in *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, one requesting party was the Legal Aid Society of Alameda County, California, but the reverse-FOIA suit was litigated in Virginia, where the requester felt it necessary to intervene. The inconvenience of cross-country intervention is magnified by the familiar rule that "an intervenor generally is held to have waived his privilege to change the venue of a suit." *Commonwealth Edison Co. v. Train*, 71 F. R. D. 391, 394 (N. D. Ill. 1976), citing *TWA v. CAB*, 339 F. 2d 56, 64 (2d Cir. 1964), *cert. denied*, 382 U. S. 842, 86 S. Ct. 40, 15 L. Ed. 2d 82 (1965) and 3B, Moore's Federal Practice § 24.19 (2d ed. 1975).

proper for judicial consideration of FOIA claims;[66] to allow submitters to force FOIA litigation[67] to occur in other arenas would free the tail to wag the dog.[68]

This, in our opinion, is the type of "undue hardship" expressly discountenanced by the Advisory Committee when it discussed amended Rule 19 in 1966.[69] The rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible.[70] A generally applicable theory of waiver by one who declines to voluntarily step into the proceeding would abrogate the rule and its purpose completely. It is the party's —not the nonparty's—responsibility to make certain that the court has before it all those needed to enable it to serve the ends of justice. And if the essential nonparty cannot, for reasons of personal jurisdiction, be joined in the suit, then the litigation must proceed elsewhere, if at all.[71]

This case, therefore, must finally continue toward a decision on the merits in the District Court for the District

66. The Freedom of Information Act specifies "the district court of the United States in the district in which the complainant [requester] resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia" as the courts in which enforcement of the Act can properly be sought. 5 U. S. C. § 552(a)(4)(B) (1976).

67. As noted earlier, notes 29-30 *supra* and accompanying text, a court analyzing the merits of reverse-FOIA litigation must surely determine the applicability of the disclosure demands of the Act.

68. *Cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U. S. 523, 535, 87 S. Ct. 1199, 1206, 18 L. Ed 2d 270, 278 (1967).

69. Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966).

70. See *Ricci v. State Bd. of Law Examiners*, 569 F. 2d 782, 784 (3d Cir. 1978); Fed. R. Civ. P. 19(a).

71. Congress specified that the applicability of the Freedom of Information Act be litigated in the requester's district or in other designated areas, but made no provision at all for venue in the submitter's "home court." See note 66 *supra*.

of Columbia. Its first task is to analyze closely the Delaware court's reasoning, for it may turn out that the court here will agree with the Delaware court. Should, however, the court decide that the failure to release the information was indeed improper, it will have to ascertain the relief appropriate in the circumstances. Since the manufacturers are party-defendants, it might consider enjoining them from enforcing their Delaware judgment against the Commission.[72] In short, our decision is a narrow one—that this litigation is not prohibited by the earlier action—and we have not attempted to decide whether or not actual disclosure should be the final result.

Remanded.

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72. Compare *Steelman v. All Continent Corp.*, 301 U. S. 278, 291, 57 S. Ct. 705, 710-711, 81 L. Ed. 1085, 1093 (1937) with *Lapin v. Shulton, Inc.*, 333 F. 2d 169, 172 (9th Cir.), *cert. denied*, 379 U. S. 904, 85 S. Ct. 193, 13 L. Ed. 2d 77 (1964).

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No. 78-1248

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners,*

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Pursuant to Rule 24(5) of the Rules of the Supreme Court, petitioners herewith submit this Supplemental Brief in Support of their Petition for a Writ of Certiorari in order to bring to the attention of this Court an important development that affords further support for granting the petition and eliminates the major reason advanced by the Solicitor General as the basis

for his opposition to the Court's grant of the writ. That development is the unanimous affirmance by the United States Court of Appeals for the Third Circuit, on April 30, 1978—after the Solicitor General filed his brief herein—of the order entered by the Delaware District Court permanently enjoining the disclosure contested in both the Delaware and District of Columbia actions. The Clerk has agreed to allow us to lodge photocopies of the forty-eight page Third Circuit opinion with this Court as an unprinted supplemental appendix.

In the Brief for the Federal Respondents in Opposition, the Solicitor General argued that the petition should be denied because the Third Circuit might vacate the Delaware District Court's injunction in light of this Court's recent decision in *Chrysler Corp.* v. *Brown,* 47 U.S.L.W. 4434 (April 18, 1979), and thereby eliminate "any possibility of inconsistent dispositions" (Sol. Br. in Opp. 5). This argument is no longer viable now that the Third Circuit has affirmed the Delaware injunction in its entirety, in an opinion that expressly takes *Chrysler* into account.

Significantly, except for this suggestion that the petition is somehow premature, the Solicitor General's brief serves only to reinforce the validity of the reasons we have advanced (Pet. 14-31) for granting the writ. The Solicitor General states that he "substantially agree[s] with petitioners' arguments on the merits" (Sol. Br. in Opp. 5). In particular, the Solicitor General agrees that the Court of Appeals for the District of Columbia Circuit erred in rejecting the manufacturers' argument that the requesters' action could not be maintained because "[f]ailure to violate a lawful judicial order simply cannot be 'improper' "

(Sol. Br. in Opp. 7) within the meaning of the FOIA, which, in the words of the statute, confers jurisdiction on a district court only "to order the production of any agency records improperly withheld," 5 U.S.C. § 552 (a)(4)(B). In addition, the Solicitor General states: "[W]e agree with petitioners' contention (Pet. 28-30) that the court of appeals erred in instructing the district court to adjudicate, at once, a controversy that is the subject of adjudication in another federal court," and that it "makes no sense" to do so (Sol. Br. in Opp. 7).

Such substantial agreement with our reasons for granting the writ should logically have led the Solicitor General to conclude that a grant of certiorari and summary reversal by this Court would be appropriate. His reluctance to do so seems to have been based on a failure to appreciate that this Court's recent holding in *Chrysler Corp.* v. *Brown, supra,* would not aid the Government's position in the appeal then pending before the Third Circuit, as has been subsequently made clear by that court's affirmance of the Delaware injunction.[1]

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[1] The Solicitor General apparently misunderstood the issue before the Third Circuit as involving the Delaware District Court's application of the Trade Secrets Act, 18 U.S.C. § 1905 (1976). *See* Sol. Br. in Opp. 5 & n.2. As the Third Circuit's affirmance confirms, the Delaware District Court relied exclusively upon Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1) (1976), in permanently enjoining disclosure of the same documents that the private respondents herein seek to have released to them in their District of Columbia litigation. *See* op. 10-11.

In fact, far from supplying the Third Circuit with reason to vacate the Delaware injunction, this Court's holding in *Chrysler* was relied upon by the Third Circuit as validating the Delaware court's decision. *See* op. 9-10 & n.1; *see also* op. 19, 22, 39.

This perceived impediment to this Court's summary reversal of the Court of Appeals' decision has now been removed by the issuance of the Third Circuit's decision. As the Solicitor General points out, to insist on retrial in a second court of issues identical to those already decided by the Delaware court (and now the Third Circuit) in closely related litigation would "require the parties to engage in what we believe to be unnecessary and duplicative litigation" (Sol. Br. in Opp. 9). Further proceedings before the District of Columbia court would not only be a wholly unreasonable and needless imposition on the resources and time of the court and the parties, but the very concept of that court's considering on the merits the validity of the Delaware permanent injunction, now affirmed *in toto* by the Third Circuit, is unseemly and clearly improper. No further litigation is necessary to establish this proposition. The matter is ripe for decision by this Court.

The Brief for the Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group in Opposition—filed concurrently with the issuance of the Third Circuit's decision—fully recognizes the importance of the District of Columbia Circuit's decision, as well as the then-anticipated Third Circuit's decision (Resp. Br. in Opp. 8-9). The Third Circuit's decision not only affirms the permanent injunction of the Delaware court; it also holds (op. 16-17) that these respondents cannot complain under Rule 19 of the Federal Rules of Civil Procedure that they were not joined by the manufacturers as parties in Delaware because they deliberately refused to intervene in the district court litigation, even though they could have done so "without significant burden" (op. 16)—a fact

that respondents' brief in opposition, and especially its counter-question presented, carefully plays down (Resp. Br. in Opp. 2).[2]

For reasons fully set forth in the petition and supplemented herein, the petition for writ of certiorari should be granted and the case reviewed by this Court. Should the Court not deem the case worthy of full review, we urge that, in light of the Third Circuit's affirmance of the permanent injunction entered in the Delaware litigation, certiorari be granted, the judgment of the Court of Appeals vacated and the case remanded to that court with instructions to affirm the dismissal of the respondents' suit by the District of Columbia District Court.

If the Court is not wholly convinced of the appropriateness of granting certiorari at this time, we suggest that the Court refrain from acting on the petition to discover whether the Solicitor General, after full study of the Third Circuit's opinion on the merits, chooses to seek certiorari in that case.[3] The Court could

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[2] Respondents also make much of "their statutory choice of forum" (Resp. Br. in Opp. 9), totally ignoring that the manufacturers, as submitters of information, also have a statutory choice of forum under 28 U.S.C. § 1391(e) (1976) for actions they may bring under the Administrative Procedure Act to enjoin wrongful agency disclosure under the Freedom of Information Act (Pet. 22 & n.10). *See* Chrysler Corp. v. Brown, *supra*, 47 U.S.L.W. at 4444; GTE Sylvania, Inc. v. Consumer Product Safety Commission, 3d Cir. No. 78-1328, op. 9-10 & n.1.

[3] For example, the Solicitor General may seek certiorari on what he may perceive as a conflict with the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978).

then consider the petitions for certiorari in these two closely related cases at the same time.

Respectfully submitted,

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v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 590 F. 2d 1209. The original opinion of the court of appeals (Pet. App. A44-A59), which this Court vacated (see 434 U.S. 1030), is reported at 561 F. 2d 349. The opinion of the district court (Pet. App. A32-A42) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1978. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in directing the district court to adjudicate this case.

STATEMENT

In June 1974 Consumers Union and other parties ("the requesters") submitted to the Consumer Product Safety Commission a request under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for disclosure of certain documents concerning television accidents. Petitioners, who manufacture televisions, had furnished these documents to the Commission under claims of confidentiality (Pet. App. A47). In March 1975 the Commission concluded that the documents are not exempt from disclosure under the FOIA and that, even if they were not subject to mandatory disclosure, the Commission would exercise its discretion in favor of disclosing them (*id.* at A48).

After receiving notice of the Commission's decision, petitioners filed suits in the United States District Court for the District of Delaware, and in certain other federal courts, seeking to enjoin disclosure (Pet. App. A48-A49). All of these suits were consolidated in the District of Delaware. The court issued a preliminary injunction in October 1975 prohibiting disclosure of the documents pending a decision on the merits (Pet. App. A71-A107).

The requesters did not seek to intervene in the Delaware proceeding. Instead, in May 1975 they filed an action against the Commission and the manufacturers in the United States District Court for the District of Columbia, seeking disclosure of the identical documents. The Commission and the manufacturers moved to dismiss on the ground that there was no case or controversy between the requesters and the Commission; in the alternative, the Commission and the manufacturers moved to stay further proceedings pending decision in the Delaware case (Pet. App. A51).

In September 1975 the district court in the District of Columbia dismissed the requesters' suit on the ground that, in view of the fact that both the requesters and the Commission favored disclosure of the documents, there was no case or controversy, and the court therefore lacked jurisdiction (Pet. App. A32-A42).

In July 1977 the United States Court of Appeals for the District of Columbia Circuit reversed (Pet. App. A44-A59). The court first held that there is a case or controversy between the requesters and the Commission with respect to whether the Delaware proceeding prevented the District of Columbia court from adjudicating the case and ordering disclosure, and that controversy sufficed to give the court jurisdiction (*id.* at A52-A53). Second, the court held that the Delaware proceeding did not prevent the District of Columbia court from proceeding to the merits because, the court of appeals believed, the Delaware proceeding had terminated; the court also found justification for its decision because it doubted the vigor and sincerity with which the Commission opposed the manufacturers' suit in Delaware (*id.* at A57-A58). The court therefore remanded to the district court with instruction to adjudicate the merits of the requesters' suit (*id.* at A58-A59).

The manufacturers filed a petition for a writ of certiorari. While the petition was pending, the Delaware court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents (Pet. App. A118-A141).[1] In view of that action, this Court granted the manufacturers' petition, vacated the court of appeals' judgment, and remanded

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[1]The government has appealed the district court's permanent injunction to the Third Circuit. The case is *sub judice*.

the case to the court of appeals for further consideration in light of the injunction that had been issued by the Delaware court (Pet. App. A64).

On remand, the court of appeals ruled that the existence of a permanent injunction in Delaware did not alter its view that a Freedom of Information Act requester, not a party to the Delaware suit, is not barred from litigating its right to the documents in a second forum. The court reaffirmed its position that a case or controversy exists (Pet. App. A10) and ruled that the traditional anti-relitigation bars (stare decisis, collateral estoppel and comity) are inapplicable (*id.* at A11-A16). The court recognized that its holding might effectively nullify any judgment by another court in favor of a "reverse FOIA" plaintiff, but the court believed that this result could be avoided if the FOIA requester were joined as a defendant in the "reverse FOIA" lawsuit. The court also suggested that creation of a defendant class made up of all future requesters might solve the problems facing "reverse FOIA" plaintiffs (Pet. App. A17).

With respect to the government's concern that litigation of the case in two forums might subject it to inconsistent decrees, the court asserted that there were procedural devices that the government could have used to avoid that possibility. In particular, the court stated, the government could have moved to join the requesters under Fed. R. Civ. P. 19 (*id.* at A18-A20). The court of appeals thus ordered, for a second time, that the district court proceed with the case on its merits (*id.* at A23-A24).

ARGUMENT

For a second time, the court of appeals has instructed the district court to adjudicate the merits of the requesters' FOIA suit. For a second time,

circumstances bearing on the disposition of this case have changed while a petition for a writ of certiorari was pending. As a consequence, for a second time we urge the Court to deny review even though we substantially agree with petitioners' arguments on the merits.

The change of circumstances is that this Court now has held, in *Chrysler Corp.* v. *Brown*, No. 77-922 (April 18, 1979), slip op. 10, that "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford [any person] any right to enjoin agency disclosure." "Reverse FOIA" actions thus are untenable. Disclosure of information by federal agencies may be inhibited only if some statute other than the FOIA forbids disclosure. Moreover, the Court held, agency regulations may be "authorization by law" within the meaning of the Trade Secrets Act, 18 U.S.C. 1905, and so permit disclosure notwithstanding that statute.[2] Although the manufacturers have argued that the Consumer Product Safety Act itself bars the disclosure sought here, the Third Circuit presumably will take *Chrysler* into account when it reviews the Delaware court's decision. The upshot of that review—whether or not the decision is affected by *Chrysler*—may be to dissolve the Delaware injunction, and thus to eliminate any possibility of inconsistent dispositions.

Petitioners' arguments are based in large measure on the possibility of inconsistent adjudications in Delaware and the District of Columbia, and petitioners'

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[2]The Consumer Product Safety Commission is authorized to disclose trade secrets and other information covered by 18 U.S.C. 1905 when the information in question is "relevant in any proceeding under this chapter." 15 U.S.C. 2055(a)(2). See also 15 U.S.C. 2055(b)(2)(B), 2074(c).

arguments about the existence of a "case or controversy" are colored by the Delaware order. If the Delaware order should be altered, this litigation would be in a fundamentally different posture. Because it is likely that the Third Circuit will dispose of the appeal from the Delaware injunction before this Court could adjudicate the arguments presented by petitioners, we believe that the prudential course is for this Court to deny the petition. A denial would simply return the case to the district court for additional proceedings. If those proceedings should lead to an order entered by the District of Columbia court that conflicts with the order entered by the Delaware court—if, indeed, the District of Columbia proceedings lead to any order at all—there would be time enough for review. Nonetheless, because petitioners have requested that the court of appeals' judgment be reversed summarily, we offer a short statement of our views on the merits of the issues presented by the petition.

First, we agree with petitioners' contention (Pet. 20-21) that the requesters have not stated a claim for which the FOIA grants a right to relief. The FOIA grants district courts "jurisdiction * * * to order the production of any agency records improperly withheld from the complainant" (5 U.S.C. 552(a)(4)(B)). The meaning of this phrase is a principal subject of the dispute in *Kissinger* v. *Reporters Committee for Freedom of the Press*, cert. granted, No. 78-1088 (April 16, 1979). But no one has argued in *Kissinger* that the withholding of a document pursuant to an injunction entered by a federal court of competent jurisdiction is "improper" within the meaning of the FOIA. Although petitioners and the Commission raised this point in the court of appeals, the court's opinion did not address it. We take this as an indication that the court disagreed with our submission. That was error. Obedience to the injunction was proper. Disobedience

would be contempt of court. Failure to violate a lawful judicial order simply cannot be "improper." Consequently, the complaint in this case should have been dismissed or summary judgment entered against the requesters.

Second, we agree with petitioners' contention (Pet. 28-30) that the court of appeals erred in instructing the district court to adjudicate, at once, a controversy that is the subject of adjudication in another federal court. It is established that a federal district court should refrain from duplicating or interfering with the proceedings and orders of another federal court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). Adjudication of the requesters' suit by the District of Columbia court would duplicate the efforts of the Delaware court.

There is no reason to depart from that general rule in this case.[3] In our view it makes no sense to require

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[3]The various procedural devices suggested by the court of appeals, including joinder of requesters under Fed. R. Civ. P. 19 in reverse FOIA cases and transfer or consolidation of cases filed in different courts, sometimes may be a feasible and appropriate means of avoiding potential conflicts in such cases. Indeed, in this case the Commission moved the Delaware court to transfer petitioner's suit to the District of Columbia for that very purpose, but the Delaware court denied the motion because of its prior jurisdiction and the extent of the litigation already completed in that court (Pet. App. A109-A117).

Contrary to the view of the court below, however, devices like Rule 19 are not always feasible or appropriate. Venue over the joined parties could be improper or particularly inconvenient in the forum in which the action was brought, and transfer of the action to the district in which the joined parties reside could be inconvenient to the parties who first brought the action (see 28 U.S.C. 1391(e) and 1404(a)). The court's further suggestion (Pet. App. A17) that petitioners could have maintained their suit in

the district court in the District of Columbia to adjudicate the same issues, involving the same materials, that have been adjudicated in Delaware and that are now pending in the Third Circuit. The only result of that effort will be that the courts in the District of Columbia either eventually will agree with the Delaware court or will subject the Commission to conflicting orders that may effectively compel this Court's review.[4] But even though the judgment here

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Delaware as a "defendant class action" against the Commission and "all those who likely may subsequently make such requests" or "all possible requesters" seems difficult to reconcile with the requirements of Fed. R. Civ. P. 23. Cf. *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975). In short, the court's assumption that, with sufficient "creativity" (Pet. App. A18), some procedural device can always be found to accommodate the conflicting interests of different parties and to avoid the potential for conflicting judgments is unfounded, and it does not justify departure from the general and salutary rule that adjudication of a controversy should be conducted by the court first acquiring jurisdiction.

[4]Petitioners raise two additional arguments. Neither of them, in our view, warrants this Court's review at this time. First, petitioners argue (Pet. 16-20) that the requesters failed to make out an Article III "case or controversy." Although we originally advanced the same argument, on further reflection we have become persuaded (as we noted in our brief in opposition to petitioners' first petition for a writ of certiorari (Br. in Opp. 5)) that there are significant differences between the position of the Commission and the requesters with respect to the relief that can be provided in the face of a permanent injunction, and that such differences satisfy the "case or controversy" requirement.

Petitioners also contend (Pet. 21-25) that the requesters are collaterally estopped from litigating their Freedom of Information Act claim because they failed to intervene in the Delaware suit. In general, however, only the parties to a previous action are subject to estoppel. Any person is entitled to one full and fair opportunity for litigation. In rare cases, non-parties may be subject to estoppel. See, *e.g.*, *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979) (nonparty who assumes actual control over litigation in which it had a direct financial or proprietary interest held subject to collateral estoppel). That principle, however, does not control here. The requesters did not dictate the Commission's litigation strategy in the Delaware case. Moreover, the judgment in the Delaware case is not yet final, and so it would have no estoppel effect even with respect to the Commission. Petitioners rely on dictum in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), in which the Court suggested, without deciding, that a nonparty might "be bound by the previous decision because, although technically a nonparty, he had purposely by-passed an adequate opportunity to intervene" (Pet. 21-25). The court of appeals concluded (Pet. App. A22) that the requesters in this case "and perhaps information—requesters generally, should not suffer from bypasses of this sort." Whether that conclusion was legally correct, or whether the facts here would establish the kind of purposeful bypass necessary to subject a nonparty to collateral estoppel, are potentially significant questions. But we see no need for this Court to review that abstract proposition at this time, because it ultimately may have no effect on the outcome of this case.

will require the parties to engage in what we believe to be unnecessary and duplicative litigation, that burden will not be so great that this Court should grant review in advance of any appellate court decision on the merits. Should the Commission eventually find itself subject to inconsistent judgments and decrees from the two appellate courts, it may at that time seek this Court's review of both the procedural and substantive issues in the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, *ET AL.*,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP IN OPPOSITION

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Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group agree with the federal respondents, the Consumer Product Safety Commission and its members ("CPSC"), that the petition for a writ of certiorari should be denied. However, since our views of the merits of the question presented are very different from those of the CPSC, we separately oppose review.

Opinions Below

The opinion of the Court of Appeals (Pet. App. A1-A24) is reported at 590 F.2d 1209. The original opinion of the Court of Appeals (Pet. App. A44-A59), which this Court vacated (*see* 434 U.S. 1030), is reported at 561 F.2d 349. The opinion of the District Court (Pet. App. A32-A42) is reported at 400 F. Supp. 848.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1978. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals correctly hold that the right to bring an action under the Freedom of Information Act in a statutorily prescribed forum is not lost simply because the submitters of the requested information filed a few days earlier in other district, without naming or attempting to join the requesting parties in those actions?

Statement of the Case

Two events in the spring of 1974 gave rise to this action: the CPSC requested that manufacturers of television sets submit to it data on accidents involving their products, and the respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (the "requesters") asked for that data under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"). Because the manufacturers requested confidential treatment for their submissions, the CPSC did not immediately release them. (Pet. App. A47). While the requesters had the right at that point to bring suit under the FOIA because the CPSC had failed to make the data promptly available, they chose not to sue, but to allow the administrative process to be completed. Ironically, if they had exercised their right to sue immediately, the procedural issue in this case would never have arisen, a fact not likely to be lost on future requesters if the position of the manufactuers and the government prevails.

After considerable delay, the CPSC announced on March 28, 1975, that it intended to release the data on May 1, 1975 – except certain portions relating to individuals which the requesters had previously agreed not to seek – unless a court ordered the information withheld (Pet. App. A48). At this point, the requesters had no reason to sue since the CPSC had promised to release the data and since they did not know which, if any, manufacturers would seek to enjoin the release. In fact, twelve of the fifteen manufacturers did bring suit in four different Districts, and all of them obtained temporary restraining orders before May 1st, generally with the consent of the CPSC (Pet. App. A48-49). The CPSC neither moved to join the requesters, nor to transfer the cases to a forum, such as the District of Columbia, where the requesters could readily be added as parties. The CPSC instead obtained the transfer of four of the cases, which had been brought in the Southern and Western Districts of New York and the Eastern District of Pennsylvania, to the District of Delaware, where the remaining cases had been filed (Pet. App. A49). That forum is the District of incorporation of all twelve manufacturers, but it is not the principal place of business of any of them.

On May 5, 1975, the requesters filed their FOIA case in the District Court for the District of Columbia (Pet. App.

A51). Unlike the other actions, this one named not only the CPSC, but the truly adverse parties – the 12 manufacturers – as additional defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. But even this action failed to prompt the CPSC to alter its position in Delaware; instead, the Commission agreed to extend the temporary restraining orders beyond the 20-day maximum of Rule 65(a), until the preliminary injunction hearing could be heard (July 25th) and eventually decided. At the same time, all defendants in the District of Columbia, private and public, moved to dismiss that action, claiming that no case or controversy within Article III of the Constitution existed, because the CPSC wanted to, but would not, disclose the accident data. In the alternative, the CPSC and the manufacturers sought a stay of all proceedings in the District of Columbia pending a decision in Delaware, even though the requesters were not parties to the Delaware actions (Pet. App. A51). The sequence of these events is important because the petitioners and the CPSC have vigorously urged both in this case and in Delaware that the Delaware cases should go forward because they are comparatively further advanced, a situation that exists solely due to their unrelenting efforts to prevent the District of Columbia case from proceeding to the merits.

On September 22, 1975, the District Court in the District of Columbia agreed with the defendants' Article III claim (Pet. App. A32-A42). The Court concluded that because the CPSC found that the data had to be released, there was no case or controversy between it and the requesters, even though the CPSC refused to make the documents available because of the outstanding temporary restraining orders. As to the manufacturers, the District Court concluded that there was no independent cause of action under the FOIA against a private party, and that there was no subject matter jurisdiction in an action against the manufacturers in

any event. Exactly one month later, the District Court in Delaware issued its opinion, preliminarily enjoining the release of the data by the CPSC pending the outcome of the case on the merits (Pet. App. A71-A107).

The requesters then appealed the dismissal of their case to the D.C. Circuit Court of Appeals. Twenty-two months after the District Court decision, the Court of Appeals, in an opinion by Judge Wright, joined by Chief Judge Bazelon and Judge Robinson, reversed and directed the District Court to proceed to hear the merits (Pet. App. A44-A59). The Court held that there is an Article III case or controversy with respect to whether the preliminary injunction in Delaware prevented the District of Columbia Court from adjudicating the requesters' claim. In addition, the Court noted that since the preliminary injunction had been entered in Delaware in October, 1975, no further action had taken place, and that it thus appeared that the case had terminated.

Immediately thereafter, a conference was convened in Delaware before the District Court, and preparations were made to proceed with a hearing on a permanent injunction. Petitions for rehearing were then filed in the D.C. Circuit which pointed out the recent developments in Delaware (Pet. App. A61). At this late date, the CPSC finally filed a motion under 28 U.S.C. § 1404(a) in Delaware to transfer those cases to the District of Columbia. The CPSC did not, however, suggest that the requesters ought to be joined as parties under Rule 19, or that some effort should be made to bring all parties together in one consolidated proceeding. Not surprisingly, since the case had been pending in Delaware for more than two years, the District Court denied the transfer motion (Pet. App. A109-A117).

The D.C. Circuit denied rehearing. In a supplementary opinion, the Court noted the recent activity in Delaware, but concluded that nothing that had transpired there was relevant to this independent FOIA action, since it was only in the District of Columbia that all interested parties had been joined (Pet. App. A60-A63). The manufacturers then sought review in this Court, but without the support of the CPSC, which for the first time agreed that its earlier position regarding the absence of a case or controversy was in error (Pet. App. A10-A11 n. 33). Meanwhile, the District Court in Delaware heard the case on the merits, and on December 8, 1977, issued a permanent injunction (Pet. App. A118-A141). This fact, according to the CPSC, was a significant change in circumstances which it assumed would cause the District of Columbia courts to reconsider the question of proceeding to the merits, and it so advised this Court in opposing *certiorari*. On January 16, 1978, this Court granted *certiorari* and summarily vacated the decision "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware" (Pet. App. A64).

Although both the manufacturers and the requesters promptly asked the Court of Appeals to establish a briefing schedule, nothing occurred until September 20, 1978, when the Court ordered the submission of supplementary memoranda within 20 days (Pet. App. A65-A70). After a brief extension, memoranda were submitted, and on December 22, 1978, in a thorough opinion by Judge Spottswood Robinson, the D.C. Circuit concluded that the entry of a permanent injunction in Delaware had no effect on the right of the requesters to bring this FOIA action (Pet. App. A1-A24). Judge Robinson carefully considered the numerous objections raised by the defendants, in particular their principal argument that because the manufacturers had

filed first, they had an unalterable right to choose the forum. Thus, according to petitioners and the CPSC, if the requesters wanted to participate in litigation on these issues, they had to intervene in Delaware. On this point, the Court concluded that in light of the great concern that Congress has shown in the FOIA for the rights of requesting parties, including special rights in forum selection, and the absence of any specific cause of action, let alone any venue preference, for submitters of information such as the manufacturers, the requesters were well within their rights in bringing this action in the District of Columbia (Pet. App. A20-A24).

In the meantime, following the decision in Delaware in December, 1977, the CPSC appealed to the Third Circuit. Since neither the parties nor the District Court had sought to join the requesters under Rule 19, they decided to file a brief *amicus curiae*, asking the Court of Appeals to reverse the Delaware District Court's failure to comply with that Rule (Pet. App. A142-144). Once again, the manufacturers and the CPSC were united in their opposition, first to the filing of any brief, then on their views on the merits of the Rule 19 issue. The Third Circuit, however, allowed the requesters to brief the issues as *amicus* and to participate in oral argument on January 12, 1979. As of this date, no decision has been rendered either on the Rule 19 issue or on the portion of the merits of the case which had formed the basis of the District Court's opinion.

Once again the manufacturers have sought review in this Court of the decisions of the D.C. Circuit, and once again the CPSC has asked this Court not to grant the petition. The CPSC nonetheless maintains that the decisions below are in error, but simply not in need of this Court's attention at this time.

Reasons for Denying the Writ

No one has suggested that any prior case in this or any other Court involves procedural issues substantially the same as those in this case, let alone that they have been resolved in a manner in conflict with the decisions of the D.C. Circuit. The only arguable conflict that might arise – in the related case in the Third Circuit – is no more than a possibility. That Court may agree with the requesters on the Rule 19 issue, or it may reverse on the merits without reaching the Rule 19 question, either with or without directions to the District Court to consider Rule 19 in the first instance.* Even if the Third Circuit does not agree with requesters that the case should be reversed for failure to comply with Rule 19, the result would not necessarily be in conflict with the outcome in the D.C. Circuit. That decision might be based on timeliness grounds, or some arguable waiver theory, both of which have been urged by the manufacturers and the CPSC. In any event, if the Third Circuit finds Rule 19 to be inapplicable and thus reaches a decision on the merits, there still would be no conflict since the D.C. Circuit has expressed no view on the merits of the requesters' claim. Such a ruling would only mean that the two actions would proceed independently. As the Court of Appeals stated, however, if that situation should occur, the manufacturers and the CPSC should not be heard to complain since they made no effort to consolidate the proceedings in a forum where all parties could readily be joined. (Pet. App. A21).

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*Since the District Court in Delaware reached only one of the numerous claims of the manufacturers, a reversal on the merits would by no means end the controversy there. The remaining issues would then have to be decided under this Court's recent decision in *Chrysler Corp. v. Brown*, No. 77-922, 44 U.S.L.W. 4434 (April 17, 1979).

While the issue resolved by the D.C. Circuit is an important one, no reason exists for this Court to review it since the result reached is plainly correct. The Court below has concluded, in three separate opinions, that FOIA requesters are not to be denied either the right to sue established by the FOIA, or their statutory right to a wide choice of venue, 5 U.S.C. § 552(a)(4)(B), simply because reverse FOIA plaintiffs, such as petitioners, have won a race to the courthouse which began only after a federal agency concluded that no basis existed for declining disclosure of the requested records. Any other outcome would turn the Act on its head by allowing submitters to control the forum of litigation in every case in which the real contest was between submitters and requesters over the disclosure of documents. For surely, if there is no case or controversy here, after twelve submitters have filed suit, none would have existed after a decision to release had been made but before any reverse FOIA action was brought, the only other instance in which the requesters could win a "race" to the courthouse. The inevitable result would be to encourage requesters to sue as soon as the agency's time for response under the Act had expired, thus short-circuiting the administrative process and causing cases to be brought prematurely and often unnecessarily into the federal courts. And the sole purpose that requesters would have in filing such anticipatory litigation would be to prevent the loss of their statutory choice of forum.

The D.C. Circuit correctly perceived the procedural problems facing requesting parties, and it fashioned the appropriate solution. In doing so, it correctly balanced the legitimate interests of all parties and properly considered the concern of the courts in avoiding multiple litigation over the same issue. Accordingly, no useful purpose would be served by this Court in reconsidering the opinions of the D.C. Circuit on this question.

Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

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OCTOBER TERM, 1978

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Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
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On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	5
SUMMARY OF ARGUMENT	15
ARGUMENT	20
I. No Justiciable Case or Controversy Is Presented Where an Agency that Is Permanently Enjoined from Releasing Information Agrees with FOIA Requesters that the Information Should Be Released	20
II. Information Is Not "Improperly Withheld" Within the Meaning of the FOIA when the Agency Desires To Disclose that Information But Is Prohibited from Doing So by a Permanent Injunction Entered by a Court of Competent Jurisdiction	30
A. Neither the FOIA Itself nor Any Legislative History Suggests that Documents Are Improperly Withheld when the Agency Has Been Permanently Enjoined from Releasing Them	32
B. The FOIA Does Not Set Aside General Equitable Principles Which Provide Sufficient Flexibility To Enable a District Court Exercising Jurisdiction under 5 U.S.C. § 552(a)(4)(B) To Respect a Permanent Injunction of a Coordinate Federal Court	36
III. Established Principles of Comity and Finality of Judgments Mandate that the Requesters' Action Not Proceed	38

Page

A. The District of Columbia Circuit Wrongfully Elevated the Rights of the Requesters over Those of the Manufacturers by Ignoring the Policies Expressed in Section 6(b)(1) of the Consumer Product Safety Act Prohibiting Disclosure and the Applicable Venue Provision, 28 U.S.C. § 1391(e) 39

B. The Court of Appeals' Direction to The District Court To Proceed to the Merits of the Requesters' Action and Consider Enjoining the Manufacturers from Enforcing the Delaware Litigation Does Violence to Principles of Comity and the Orderly Administration of Justice 42

C. The Requesters Should Be Precluded from Relitigating in the District of Columbia Matters Already Thoroughly Litigated and Finally Determined in Delaware 52

1. The requesters should be bound because they deliberately bypassed ample opportunities to participate in the Delaware litigation 53

2. The requesters should be bound because their interests in the outcome of the Delaware litigation were adequately represented by the CPSC throughout and also on appeal by Consumer Federation of America 56

CONCLUSION 63

CASES: Page

ACLU v. *Laird*, 463 F.2d 499 (7th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973) 44, 50

Aerojet-General Corp. v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 57

American Servicemen's Union v. *Mitchell*, 54 F.R.D. 14 (D.D.C. 1972) ..... 62n.

Anderson v. *United States*, 217 F. Supp. 814 (E.D. Pa. 1963) ..... 25n.

Atlantic Richfield Co. v. *FTC*, 398 F. Supp. 1 (S.D. Tex. 1975), *aff'd on other grounds*, 546 F.2d 646 (5th Cir. 1976) 22

Baker v. *Carr*, 369 U.S. 186 (1962) 22

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971) 52

Boddie v. *Connecticut*, 401 U.S. 371 (1971) ..... 53n.

Broder v. *Pfizer, Inc.*, [1973-1] Trade Cas. (CCH) ¶ 74, 268, at 93, 271 (S.D.N.Y. 1972) 57

Brotherhood of Locomotive Firemen & Enginemen v. *Central of Georgia Railway*, 411 F.2d 320 (5th Cir. 1969) 51, 52

Bullock v. *Edwards*, 403 F. Supp. 913 (E.D. La. 1975) 27

Califano v. *Sanders*, 430 U.S. 99 (1977) ..... 31n.

Caterpillar Tractor Co. v. *International Harvester Co.*, 120 F.2d 82 (3d Cir. 1941) 48

Charles River Park "A," Inc. v. *Department of Housing and Urban Development*, 519 F.2d 935 (D.C. Cir. 1975) 33

Cherokee Nation v. *Hitchcock*, 187 U.S. 294 (1902) ... 55n.

Chrysler Corp. v. *Brown*, —— U.S. ——, 99 S. Ct. 1705 (1979) ..... 18 *et passim*

Chicago & Grand Trunk Railway v. *Wellman*, 143 U.S. 339 (1892) 21-22, 23

Cleveland v. *Chamberlain*, 66 U.S. (1 Black) 419 (1861) 22

Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 43, 44

Page

Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 59-60

Consumers Union of the United States, Inc. v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971) ..... 36n.

Covell v. *Heyman*, 111 U.S. 176 (1884) 44

Cummins Diesel Michigan, Inc. v. *The Falcon*, 305 F.2d 721 (7th Cir. 1962) 53

Delaware Women's Health Organization, Inc. v. *Wier*, 441 F. Supp. 497 (D. Del. 1977) 22

Dworman v. *Mayor of Morristown*, 370 F. Supp. 1056 (D.N.J. 1974) 22

East Tennessee, Virginia & Georgia Railroad v. *Southern Telegraph Co.*, 125 U.S. 695 (1888) 22

Edwards v. *Schlesinger*, 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub. nom. Waldie* v. *Schlesinger*, 509 F.2d 508 (D.C. Cir. 1974) ..... 62n.

Expert Electric, Inc. v. *Levine*, 554 F.2d 1227 (2d Cir.) *cert. denied*, 434 U.S. 903 (1977) ..... 56n.

Exxon Corp. v. *FTC*, 384 F. Supp. 755 (D.D.C. 1974) .. 32n.

Flast v. *Cohen*, 392 U.S. 83 (1968) 21, 23, 24

Fletcher v. *United States*, 174 F.2d 373 (4th Cir.), *cert. denied*, 338 U.S. 851 (1949) ..... 50n.

FTC v. *Wearly*, No. 78-1586 (D.C. Cir. May 9, 1979), *cited in* [1979] Antitrust & Trade Reg. Rep. (BNA) No. 916 at A-14 (May 31, 1979) ..... 49n.

Gambocz v. *Yelencsics*, 468 F.2d 837 (3d Cir. 1972) .. 56n.

General Services Administration v. *Benson*, 415 F.2d 878 (9th Cir. 1969) ..... 36n.

Gonzales v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973) ..... 62n.

Granfield v. *Catholic University of America*, 530 F.2d 1035 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976).. 22

Page

Gras v. *Stevens*, 415 F. Supp. 1148 (S.D.N.Y. 1976) 27, 27n.

Great Northern Railway v. *National Railroad Adjustment Board*, 422 F.2d 1187 (7th Cir. 1970) ....43, 47n.

Gregory-Portland Independent School District v. *Texas Education Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, —— U.S. ——, 99 S. Ct. 1423 (1979) ..... 45 *et passim*

GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 598 F.2d 790 (3d Cir. 1979) .....8 *et passim*

GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (D. Del. 1977) 8, 13, 26

GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 438 F. Supp. 208 (D. Del. 1977) ..9 *et passim*

GTE Sylvania, Inc. v. *Consumer Product Safety Commission*, 404 F. Supp. 352 (D. Del. 1975) 7, 8

Halperin v. *Department of State*, 565 F.2d 699 (D.C. Cir. 1977) ..... 36n.

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 33, 37

Henrie v. *Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973) .....27, 27-28n.

Hilton Hotels Corp. v. *Weaver*, 325 F.2d 1010 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 951 (1964) 49, 51

In re East River Co., 266 U.S. 355 (1924) 34

Indianapolis School Commissioners v. *Jacobs*, 420 U.S. 128 (1975) ..... 61n.

Jahncke Service, Inc. v. *OKC Corp.*, 301 F. Supp. 866 (D. Del. 1969) 51

Jefferson School of Social Science v. *Subversive Activities Control Board*, 331 F.2d 76 (D.C. Cir. 1963).. 56n.

Knopf v. *Colby*, No. 73-4626 (S.D.N.Y. Nov. 12, 1973) .. 51

Land v. *Dollar*, 190 F.2d 366 (D.D.C. 1951), *cert. dismissed*, 344 U.S. 806 (1952) 47, 48n., 56

Lapin v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 904 (1964) .....44, 50, 52n.

Page

Letmate v. *Baltimore & Ohio Railroad*, 311 F. Supp. 1059 (D. Md. 1970) ..... 25n.

Linker v. *Hills*, 453 F. Supp. 556 (S.D.N.Y. 1978) ....32n.

Lord v. *Veazie*, 49 U.S. (8 How.) 251 (1850) 21

Mann Manufacturing, Inc. v. *Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971) 45, 50

Maryland Casualty Co. v. *Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) 23

Merrick v. *Merrick*, 441 F. Supp. 143 (S.D.N.Y. 1977) . 27

Montana v. *United States*, —— U.S. ——, 99 S. Ct. 970 (1979) .....52, 53n.

Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (*per curiam*) 21

Muskrat v. *United States*, 219 U.S. 346 (1911) 21

National Licorice Co. v. *NLRB*, 309 U.S. 350 (1940) .. 59

Nolen v. *Rumsfeld*, 535 F.2d 890 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) ..... 32n.

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 22, 23

Panama Railroad Co. v. *Johnson*, 264 U.S. 375 (1924).. 34

Parklane Hosiery Co. v. *Shore*, —— U.S. ——, 99 S. Ct. 645 (1979) 52

Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486 (1968) 53, 59

PepsiCo, Inc. v. *FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) 60

Pharmaceutical Manufacturers Association v. *FDA*, No. 77-291 (D. Del.) ..... 54n.

Pierce & Stevens Chemical Corp. v. *Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978)..29n., 58n.

Pierce & Stevens Chemical Corp. v. *Consumer Product Safety Commission*, 578 F.2d 1369 (2d Cir. 1978).. 29n.

Page

Pierce & Stevens Chemical Corp. v. *Consumer Product Safety Commission*, 439 F. Supp. 247 (W.D.N.Y. 1977) ..... 29n.

Port of Boston Marine Terminal Association v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) ... 59

Prate v. *Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) 49, 53

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 53

Randall v. *Jenkins*, 271 F. Supp. 904 (E.D. Pa. 1967) .. 51

Renegotiation Board v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 36

Robertson v. *Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975) ..... 47n.

Robertson v. *Railroad Labor Board*, 268 U.S. 619 (1925) 33-34

Robinson v. *Kimbrough*, 558 F.2d 773 (5th Cir. 1977) (*en banc*) (*per curiam*) .....27, 27n.

Rondeau v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975) .. 37, 37n.

Roode v. *Michaelian*, 373 F. Supp. 53 (S.D.N.Y. 1974) 58

St. Louis Amusement Co. v. *Paramount Pictures, Inc.*, 61 F. Supp. 854 (E.D. Mo.), *appeal dismissed per curiam*, 326 U.S. 680 (1945), *aff'd on other grounds*, 168 F.2d 988 (8th Cir. 1948) 45, 46, 48, 50

Semler v. *Psychiatric Institute, Inc.*, 575 F.2d 922 (D.C. Cir. 1978) 48

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) 23, 26-27

Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) ..... 31n.

Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) ..... 36n.

South Spring Hill Gold Mining Co. v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892) 22

Page

Southwest Airlines Co. v. *Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 56-57

Steelman v. *All Continent Corp.*, 301 U.S. 278 (1937) .. 49n.

Tilley Lamp Co. v. *Thacker*, 454 F.2d 805 (5th Cir. 1972) ..... 25n.

Torquay Corp. v. *Radio Corp. of America*, 2 F. Supp. 841 (S.D.N.Y. 1932) ..... 45 *et passim*

Treasure Salvors, Inc. v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507 (S.D. Fla. 1978) 53

United States v. *Citizens National Trust & Savings Bank*, 166 F. Supp. 410 (S.D. Cal. 1958), *aff'd*, 270 F.2d 128 (9th Cir. 1959) ..... 46, 47, 48n.

United States v. *Johnson*, 319 U.S. 302 (1943) (*per curiam*) 22, 23

Velsicol Chemical Corp. v. *Monsanto Co.*, 579 F.2d 1038 (7th Cir. 1978) 49

Weisberg v. *Department of Justice*, 438 F. Supp. 492 (D.D.C. 1977) ..... 32n.

Western Shoshone Legal Defense & Education Association v. *United States*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976) 53

Wood-Paper Co. v. *Heft*, 75 U.S. (8 Wall.) 333 (1869) . 22n.

STATUTES AND RULES:

United States Constitution, Article III, Section 2 .... 2 *et passim*

United States Constitution, Article VI, Section 1 48

Administrative Procedure Act, 5 U.S.C. §§ 702-706 42

5 U.S.C. § 702 ..... 31n.

5 U.S.C. § 706(2)(A) 31n., 42

5 U.S.C. § 1002 (amended 1966) ..... 34, 34n.

Page

Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.* 15 U.S.C. § 2054 58

15 U.S.C. § 2055(b)(1) ..... 5 *et passim*

Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 ..... 31n.

Freedom of Information Act, 5 U.S.C. § 552

Freedom of Information Act, Pub. L. No. 89-487, § 3(c), 80 Stat. 250 (1966) (amending 5 U.S.C. § 1002) 35

Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502, § 1, 88 Stat. 1561 (amending 5 U.S.C. § 552(a)) 39

5 U.S.C. § 552(a)(3) ..... 2, 30n.

5 U.S.C. § 552(a)(4)(B) ..... 2-3 *et passim*

5 U.S.C. § 552(b) 7, 24

5 U.S.C. § 552(b)(3) 8

18 U.S.C. § 1905 7

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 31

28 U.S.C. § 1391(e) ..... 3 *et passim*

Pub. L. No. 87-748, § 2, 76 Stat. 744 (1962) (amending 28 U.S.C. § 1391) 41

28 U.S.C. § 1738 48

28 U.S.C. § 2348 59

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 19 ..... 9, 15, 25n., 55n.

Rule 23 ..... 61-62n.

Rule 24 ..... 25n.

Page

OTHER LEGISLATIVE AUTHORITIES:

Proposed Amendments Relating to Venue in Actions Against the United States, Its Officers or Agencies: Hearings on H.R. 10089 Before the Subcomm. No. 4 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. (1960) ..... 41n.

Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess. (1974) 58

H.R. Rep. No. 1936, 86th Cong., 2d Sess. (1960) ..... 41n.

H.R. Rep. No. 1497, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2418 .. 34, 34n., 35

S. Rep. No. 1992, 87th Cong., 2d Sess., *reprinted in* [1962] U.S. Code Cong. & Ad. News 2784 41

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) ... 34, 34n., 35

S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974) 35, 40

112 Cong. Rec. 13642 (1966) 34

MISCELLANEOUS:

Cates, *Venue in Corporate Suits Against Federal Agencies and Officers*, 60 MINN. L. REV. 81 (1975) 40-41

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:25 (2d ed. 1978) ..... 36n.

Developments in the Law—Remedies Against the United States and Its Officials, 70 HARV. L. REV. 827 (1957) 41

Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COL. L. REV. 1254 (1961) ..... 56n.

U.S. CONSUMER PRODUCT SAFETY COMMISSION, TAKE A CLOSE LOOK: THE CPSC OPENNESS POLICY (1976) . 58n.

Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1953) 48

7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE:

CIVIL § 1760 (1972) ..... 62n.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 63-86) is reported at 590 F.2d 1209 (D.C. Cir. 1978). The origi-

nal opinion and judgment of the Court of Appeals (A. 34-49), which this Court summarily vacated on granting certiorari (A. 62), 434 U.S. 1030 (1978), is reported at 561 F.2d 349, *reh. denied,* 565 F.2d 721 (D.C. Cir. 1977) (*per curiam*). The opinion of the United States District Court for the District of Columbia (A. 21-31) is reported at 400 F. Supp. 848 (D.D.C. 1975).

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1978. The petition for certiorari was filed on February 12, 1979 and was granted on May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States. . . ."

The Freedom of Information Act, 5 U.S.C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any),

> and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

Title 28 U.S.C. § 1391 provides in relevant part as follows:

> "(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . ."

QUESTIONS PRESENTED

(1) Does an action initiated pursuant to the Freedom of Information Act ("FOIA") to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not

released the information solely because it has been permanently enjoined from doing so by another federal district court in separate litigation instituted against it by the suppliers of the information?

(2) Has a governmental agency "improperly withheld" information within the meaning of the FOIA (5 U.S.C. § 552(a)(4)(B)) where the defendant agency has not released the information sought by the plaintiffs solely because it has been permanently enjoined from doing so by another district court?

(3)(A) Has the Court of Appeals for the District of Columbia Circuit erred in setting its own district court on a collision course with a district court in another circuit by (a) directing its own district court to determine whether an agency should be compelled to release certain information under the FOIA when the district court in the other circuit has permanently enjoined the agency from releasing the information and (b) suggesting to its district court that it may enjoin the enforcement of the permanent injunction?

(B) Are two sophisticated requesters of information under the FOIA precluded from prosecuting an FOIA action to compel a governmental agency to release information where another district court has permanently enjoined the agency from publicly releasing the information and where the requesters purposely bypassed ample opportunities to intervene in the other district court?

(C) Is the Consumer Product Safety Commission—an agency charged with informing the public of consumer product safety hazards—as a matter of law an inadequate representative in a "reverse-FOIA" action of the interests of FOIA requesters, so that a permanent injunction entered in that action forbidding the Commission from disclosing specified information does not preclude the requesters who chose not to intervene from later prosecuting, in another district court, a FOIA action to compel the Commission to disclose the specified information?

STATEMENT

This Court is being asked to reverse for a second time an order of the United States Court of Appeals for the District of Columbia Circuit setting the District of Columbia District Court on a collision course with the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit.

Almost one year after its first decision was summarily vacated by this Court, the District of Columbia Circuit has once again ordered the District Court to determine whether certain information obtained from the petitioners by the Consumer Product Safety Commission ("CPSC") should be disclosed to plaintiff-respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (collectively "the requesters") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Such disclosure is expressly forbidden by a permanent injunction entered in so-called "reverse-FOIA" litigation instituted against the CPSC by petitioners, in which it was held that disclosure would be misleading to the public and unfair to petitioners and thus is prohibited by Section 6(b)(1) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055(b)(1).

On remand from this Court's order mandating "further consideration in light of the permanent injunction

entered by the United States District Court for the District of Delaware," 434 U.S. 1030 (1978) (A. 62), the Court of Appeals reaffirmed its prior decision directing its District Court to decide the merits of the requesters' FOIA action, *i.e.*, whether the CPSC should disclose the petitioners' information, notwithstanding the final injunction entered against the CPSC in the Delaware litigation. Significantly, the District of Columbia Circuit went so far as to suggest that the District of Columbia District Court consider enjoining petitioners from enforcing the Delaware injunction, if it reaches a conclusion contrary to that reached by the Delaware District Court and subsequently affirmed by the Third Circuit.

A. Background

This proceeding concerns certain "TV-related accident" information which petitioners, twelve television manufacturers, furnished to the CPSC in response to special orders and subpoenas with the request that the data not be disclosed (A. 22-23).

In August 1974, the CPSC informed the manufacturers that the requesters had sought access, pursuant to the FOIA, to the information the manufacturers had supplied (*id.*). At the end of March 1975, the CPSC notified the manufacturers of its decision to release the manufacturers' information (A. 23-24).[1]

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[1] In order to give the CPSC sufficient time to review the voluminous submissions, the requesters had agreed that the CPSC could have until mid-March 1975 to determine whether the requested information would be made available (A. 17, ¶ 7; A. 23). In so agreeing, the requesters reserved the right to consider delay after mid-March 1975 as a denial of their request (*id.*).

B. The Delaware Proceedings

In April 1975 the manufacturers brought suit in various federal district courts against the CPSC to enjoin the threatened disclosure (A. 24). The grounds stated by the manufacturers were that such release was barred, *inter alia,* by exemptions to the FOIA, 5 U.S.C. § 552(b) (1976); by Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1) (1976); and by a provision of the Criminal Code, 18 U.S.C. § 1905 (1976). *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission ("Delaware Preliminary Injunction"),* 404 F. Supp. 352, 365 (D. Del. 1975). In order to expedite handling and ultimate disposition of all twelve actions, they were consolidated before Chief Judge Latchum in the District of Delaware, the majority of them having been brought in that district and the actions filed elsewhere having been transferred there at the request of the CPSC. *Id.* at 357.

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. *Id.* at 358. Then, on October 23, 1975, after extensive briefing and argument, Judge Latchum preliminarily enjoined the CPSC from disclosing the information "in any manner" pending further order of the court. *Id.* at 352. (The Delaware preliminary injunction is reprinted at A. 51.) Judge Latchum preliminarily determined that the CPSC had deliberately subpoenaed unverified and inaccurate information, disclosure of which would be misleading to the public and unfair to the manufacturers, contrary to the requirements of Section 6(b)(1) of the CPSA.[2] *Delaware*

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[2] This provision reads in relevant part:

> "The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which

Preliminary Injunction, 404 F. Supp. at 369-73. The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, Judge Latchum granted the manufacturers' motions for summary judgment and permanently enjoined disclosure of the information at issue. ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Delaware Permanent Injunction"***), 443 F. Supp. 1152 (D. Del. 1977).

On the CPSC's appeal, the Third Circuit unanimously affirmed in its entirety Judge Latchum's permanent injunction. ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Third Circuit Affirmance"***), 598 F.2d 790 (3d Cir. 1979) (Seitz, C.J., Gibbons and Higginbotham, JJ.). The Third Circuit held that Judge Latchum did not err in concluding that the CPSC could not release the information without first complying with the requirements of Section 6(b)(1) of the CPSA. *Id.* at 815. The Third Circuit also agreed with the Delaware court's conclusion that Section 6(b)(1) is a withholding statute of the kind described by Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). *Id.* at 814.

Despite timely notice of the Delaware litigation, the requesters deliberately refused to participate in the Delaware District Court proceedings, studiously avoiding many opportunities to intervene on the merits, including the express invitation to intervene extended by Judge Latchum on September 15, 1977 in denying the

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the identity of [a] manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this [Act]." 15 U.S.C. § 2055(b)(1).

CPSC's motion to transfer the Delaware cases to the District of Columbia. *See* ***GTE Sylvania, Inc.*** v. ***Consumer Product Safety Commission*** (***"Delaware Transfer Denial"***), 438 F. Supp. 208, 211 n.9, 212 (D. Del. 1977).[3] Although the requesters did participate in the appeal from the Delaware injunction as *amici curiae,* they avoided participating on the merits in that court as well. Instead, *amicus* Consumer Federation of America[4] briefed the question whether the documents should be disclosed under the FOIA (with no objection from the manufacturers),[5] while the requesters limited their participation in the Third Circuit appeal to the assertion that they were necessary or indispensable parties to the district court proceedings under Rule 19 of the Federal Rules of Civil Procedure. *See Third Circuit Affirmance,* 598 F.2d at 813, 797.[6]

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[3] The manufacturers also invited such intervention. *See, e.g.,* Memorandum of Appellees GTE Sylvania, Inc., and Aeronutronic Ford Corp. in Opposition to Motion [of Consumers Union of the United States, Inc., and Public Citizen's Health Research Group] for Leave To File Brief Amicus Curiae, at 5 & Exhibits A, B, and C, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[4] Consumer Federation of America, the largest consumer organization in the United States, is composed of over 225 national, state, and local consumer organizations and represents over 30 million American consumers in various activities before Congress, regulatory agencies, and the courts. Motion of Consumer Fed'n of America for Leave To File Brief as Amicus Curiae, at 1, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[5] The manufacturers did not oppose participation on the merits by *amicus* Consumer Federation of America. *See, e.g.,* Response of Appellees GTE Sylvania, Inc., and Aeronutronic Ford Corp. to Motion of Consumer Fed'n of America for Leave To File Brief as Amicus Curiae, ***GTE Sylvania, Inc.*** v. ***Consumer Prod. Safety Comm'n*** (No. 78-1328), 598 F.2d 790 (3d Cir. 1979).

[6] The requesters asked the Third Circuit to vacate Judge Latchum's permanent injunction and to instruct the Delaware court

In rejecting this contention, the Third Circuit noted that the requesters had had "adequate notice" of and "could have intervened in the Delaware litigation without significant burden" were it not for their admitted "desire to present their case in a forum that was more convenient and perceived as less hostile to their interests." *Id.* at 799. The court concluded that the requesters' decision to raise the Rule 19 issue "only after entry of a final judgment by the district court that was adverse to their interests undermines their contention that the parties' noncompliance with Rule 19 compels this Court to vacate that judgment." *Id.*

C. The District of Columbia Proceedings

After temporary restraining orders had been entered in the manufacturers' actions, the requesters instituted the present FOIA action in the District of Columbia to compel the CPSC to release the information which had been submitted by the manufacturers and which was, as the requesters acknowledged in their complaint, the subject of the Delaware litigation (*see* A. 18, ¶ 10). On September 12, 1975, Judge Richey, of the District of Columbia District Court, dismissed the requesters' action on the grounds that (1) the complaint sought no relief against the television manufacturers and (2) there was no justiciable "case" or "controversy" between the requesters and the CPSC, since those parties agreed that the information at issue should be released to the requesters and thus were not true adversaries.[7] *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission,* 400 F. Supp. 848 (D.D.C. 1975) (A. 21-31). Judge Richey ruled that he should not re-examine or countermand the temporary restraining orders entered in the Delaware litigation, which had been issued by a court of competent jurisdiction concurrent with that of his own (A. 28-29). Judge Richey also explicitly noted that it would be appropriate for the requesters to intervene in the Delaware litigation (A. 31). Rather than pursue this course, however, the requesters remained aloof from the proceedings in Delaware and appealed the dismissal of their complaint.

On July 5, 1977 the District of Columbia (Wright, J., for a panel consisting of himself, Bazelon, C.J., and Robinson, J.) reversed Judge Richey's order and remanded the case with instructions for him to proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed." 561 F.2d 349, 357 (D.C. Cir. 1977) (A. 34-49, at A. 48). The court perceived the necessary "case" or "controversy" in (1) a supposed disagreement between the requesters and the CPSC over whether the then outstanding preliminary injunction entered by Judge Latchum "unequivocally preclude[d]" the CPSC from providing the requesters with the information in question (A. 42)

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either to dismiss the actions or to transfer the litigation to the District of Columbia where they might be joined and where they had instituted their own action (*see* pp. 10-15 *infra*). *Id.* at 797. Having remained aloof from the Delaware District Court proceedings, the requesters never attempted to present to Judge Latchum the Rule 19 issue they pressed as *amici* on the CPSC's appeal. *See id.* at 796-99.

[7] One of the manufacturers, Warwick Electronics, Inc., had moved for dismissal on the additional ground that the court lacked personal jurisdiction over it (Dist. Ct. Record No. 29). In view of its disposition of the case, the District Court found it unnecessary to consider Warwick's motion (A. 30 n.15).

and (2) its suspicion that the CPSC did not really want to release the information because, in the court's view, the CPSC's early conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed" (A. 43 & n.27).[8]

The court further concluded that, in any event, the Delaware litigation had been abandoned and that the preliminary injunction was "dead" (A. 47).[9] The court also held that even if the preliminary injunction were

[8] Notably, the court with first-hand knowledge of the CPSC's conduct of the Delaware litigation sharply disagreed with the Court of Appeals' suspicion. In denying the CPSC's motion to transfer the Delaware cases to the District of Columbia, Judge Latchum described the proceedings leading up to his grant of the preliminary injunction as "a hotly contested battle." *Delaware Transfer Denial,* 438 F. Supp. at 210.

[9] In fact, the preliminary injunction was very much "alive." On August 20, 1976, the Delaware court had issued a "minute order" instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes" (A. 55). The minute order provided:

> "2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this order had not been entered."

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding" (Ct. Appls. Amending Record Order, Nos. 3 & 8, Exhibit D at 11).

These facts were brought to the attention of the Court of Appeals in exhibits that the manufacturers and the CPSC were permitted to lodge (A. 56) with their petitions for rehearing (Ct. Appls. Amending Record Order, Nos. 1-4 & 6-9; *see, e.g.,* A. 50-55).

still in existence, it could not be given preemptive effect because no private party requesting disclosure of the information had participated in the Delaware proceedings and, in the court's view, the CPSC had not adequately represented the pro-disclosure position (A. 47-48). Petitions for rehearing, together with suggestions for rehearing *en banc,* were denied, 565 F.2d 721 (D.C. Cir. 1977) (*per curiam*) (A. 58-61), but the Court of Appeals' mandate was stayed to allow the manufacturers time to file their first petition for a writ of certiorari.

On December 8, 1977 Judge Latchum issued the permanent injunction prohibiting release of the information at issue. *Delaware Permanent Injunction,* 443 F. Supp. at 1163-64. On January 16, 1978 this Court granted the manufacturers' petition for certiorari, summarily vacated the judgment, and remanded the case to the Court of Appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware." *GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.* (No. 77-508), 434 U.S. 1030 (1978) (A. 62).

On remand, the requesters and the manufacturers filed motions in January and February 1978 requesting a briefing schedule (Ct. Appls. Amending Record Order, Nos. 10 & 12). However, no action was taken by the court until September 20, 1978, when the parties were directed to submit memoranda "address-[ing] with particularity the question whether the [Delaware] permanent injunction . . . bars [the requesters], who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed" (Ct. Appls. First Record Order, No. 22).

On December 22, 1978 the Court of Appeals issued its second opinion and judgment again rejecting all of the manufacturers' arguments and remanding the case to the District Court to determine whether the information should be disclosed to the requesters. 590 F.2d 1209 (D.C. Cir. 1978) (Robinson, J., for a panel consisting of himself, Wright, C.J., and Bazelon, J.) (A. 63-86). The court expressly adhered to its prior position that the complaint presented a constitutional "case" or "controversy" notwithstanding the entry of the Delaware permanent injunction (A. 72).[10] It then concluded that neither comity nor collateral estoppel barred maintenance of the action because the requesters were not formal parties to the Delaware proceedings (A. 74-78).

In reaching these conclusions, the District of Columbia Circuit doubted that the CPSC could ever represent the interests of FOIA requesters in a "reverse-FOIA" suit so as to preclude later litigation over the same information (A. 74-75). Nor, in the court's view, did the requesters' deliberate refusal to intervene in the Delaware proceedings preclude their collateral attack on the Delaware judgment, because the District of Columbia "is the venue authorized by the FOIA" (A. 65).

Recognizing that its holding set the District of Columbia Court on a collision course with the Delaware Court (A. 78-79), the Court of Appeals blamed the

[10] The court did not address but implicitly rejected the manufacturers' argument, twice endorsed by the Solicitor General before this Court, that since the information at issue had been denied the requesters solely because of the Delaware injunction, it had not been "improperly withheld" by the CPSC within the meaning of the FOIA, 5 U.S.C. § 552(a)(4)(B). *See* Brief for Fed. Respondents in Opposition, at 6, No. 78-1248; Brief for Fed. Respondents in Opposition, at 5, No. 77-508.

conflict on the fact that neither the CPSC nor the manufacturers had joined the requesters as parties to the Delaware proceedings under Rule 19, Fed. R. Civ. P. (A. 79-80), and claimed that the manufacturers could also have avoided the problem by maintaining the Delaware litigation as a "defendant class action against the Commission and all possible requesters" (A. 79). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to "continue toward a decision on the merits" (A. 85), suggesting that its District Court consider enjoining the manufacturers from enforcing their Delaware judgment against the CPSC if the District Court disagreed with the result reached by the Delaware District Court (A. 86). The second judgment of the Court of Appeals thus is identical in terms and effect to its prior judgment which this Court summarily vacated.

The Court of Appeals' mandate was stayed to allow the manufacturers time to file their second petition for a writ of certiorari in this action, which they did on February 12, 1979. On April 30, 1979 the Third Circuit affirmed the Delaware injunction. *Third Circuit Affirmance,* 598 F.2d 790. This Court granted certiorari on May 14, 1979.

SUMMARY OF ARGUMENT

We submit that it is clear the requesters' action should not be permitted to proceed and that any one of the three independent arguments summarized below requires reversal of the judgment of the Court of Appeals and dismissal of the complaint.

1. There is no case or controversy as required by Article III of the Constitution because both the requesters and the CPSC—the only defendant against

whom relief is or can be sought—desire precisely the same result in this case, namely, release of the information in question. Article III limits the business of federal courts to questions presented in the adversary form historically viewed as capable of judicial resolution. The requirement of adverseness ensures sound adjudication and the integrity of the judicial process, both of which depend upon the parties to focus and present fully all relevant facts and arguments.

Whether there is a case or controversy must be ascertained from the initial pleadings. In this case, the requesters' complaint and the CPSC's answer demonstrate that they both stand in the identical position on the ultimate issue in this case. The only reason that the information has not been released to the requesters is because the CPSC has been forbidden from doing so by restraining orders, a preliminary injunction and, most recently, a permanent injunction issued by the Delaware District Court and affirmed in its entirety by the Third Circuit. The consequence of this lack of adverseness is that both the requesters and the CPSC will argue on the merits the identical position and thus engage in a charade not countenanced by Article III.

In the decision on review here, the District of Columbia Circuit adhered to its prior finding of a case or controversy in its first opinion in this case, which this Court summarily vacated just over a year ago. In its first opinion, the Court of Appeals attempted to circumvent the congruence of interests between the requesters and the CPSC in two ways, neither of which can withstand scrutiny.

First, the Court of Appeals contrived a disagreement as to whether the orders entered by the Delaware District Court precluded the CPSC from providing the documents to the requesters. No one has ever disputed that the Delaware orders prohibit the CPSC from releasing the information, and this is not the issue that was remanded for trial. The withholding of the information is attributable to the action of the Delaware court and cannot be laid at the doorstep of the CPSC.

Second, the District of Columbia Circuit challenged the *bona fides* of the CPSC's stated desire to release the documents. This attack obviously has no foundation in fact. Although the Court of Appeals in its subsequent decision upon remand from this Court appeared belatedly to retract its charges against the CPSC, it nevertheless adhered, without further reasoning, to its earlier finding of a case or controversy. This result should not be sanctioned by this Court.

2. The information sought is not being "improperly withheld" by the CPSC. The requesters rely upon the jurisdiction vested in district courts by the FOIA, which provides that a district court "has jurisdiction . . . to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B). There can be no "improper withholding" by an agency that desires to release documents but is forbidden from doing so by a permanent injunction entered by a court of competent jurisdiction. Accordingly, the requesters' complaint fails to state a claim upon which relief can be granted.

Neither 5 U.S.C. § 552(a)(4)(B) nor any other provision of the FOIA provides any basis for con-

cluding that the statute contemplates that a judicial decree permanently enjoining disclosure can be parlayed into a claim of "improper withholding" by the agency. This Court has established that the FOIA does not stand in the way of "reverse-FOIA" suits. *See Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979). It must follow that nothing in the FOIA negates the results of such suits when they are adverse to the agency and to the requester. Furthermore, the legislative history indicates that it was unjustified agency withholding at which the FOIA was directed, not withholding pursuant to a final order of a court of competent jurisdiction.

Moreover, a court exercising jurisdiction under the FOIA retains its inherent equitable power to preserve the integrity of judicial orders by respecting a permanent injunction of a coordinate federal court. This was the appropriate course here, and the District of Columbia Circuit erred in reaching a contrary result.

3. In ordering the District Court to forge ahead on a collision course with the Delaware court, the District of Columbia Circuit ignored the lengthy and hard-fought battle that has already taken place between the manufacturers (arguing against disclosure of the information) and the CPSC (arguing for release of the information).

The decision below would require relitigation in the District of Columbia of the very dispute as to which the manufacturers have finally prevailed in Delaware. The decision also creates for the CPSC the potential dilemma of being subject to two diametrically opposed injunctions from different federal courts, one prohibiting and the other requiring release of precisely

the same information. The District of Columbia Circuit's rationale for such extraordinary results is simply that FOIA requesters should never be bound by an order enjoining a governmental agency from releasing certain information unless they were parties to the case in which the order was entered. This holding is unwarranted and will render meaningless reverse-FOIA actions because of the impossibility of joining all actual and potential FOIA requesters in such actions, a result clearly not within the contemplation of this Court. *See Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979).

In reaching its decision, the District of Columbia Circuit improperly elevated the rights of FOIA requesters over the rights of submitters of information to the government. The court took no account of the strong policy expressed in Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1), granting submitters special protection against disclosure of misleading information to the public. It likewise ignored the clear Congressional objective to allow submitters of information to sue the government locally reflected in 28 U.S.C. § 1391(e), instead concentrating its attention exclusively on the venue provisions of the FOIA and the rights of requesters.

Moreover, the District of Columbia Circuit erred in rejecting the argument advanced by the manufacturers and the CPSC that, in light of the permanent injunction entered in the Delaware litigation, the doctrine of comity required that the District of Columbia action not be permitted to proceed and that the requesters be referred to the Delaware District Court to present their claim that the information should be disclosed to them. The court also improperly disre-

garded authorities cited by the manufacturers holding that individuals may be precluded from relitigating matters already determined in a litigation to which they were not parties, especially where the litigation was in the nature of judicial review of an administrative determination.

The result reached by the District of Columbia Circuit in this case is particularly unwarranted considering the undisputed fact that the requesters were well aware of but deliberately refused to participate in the Delaware litigation. Even when they appeared as *amici* in the Third Circuit appeal, the requesters refused to comment on the merits of the Delaware injunction. Despite their failure to intervene, however, their interest in obtaining the information at issue was more than adequately represented by the CPSC, which has vigorously argued in favor of disclosure of the information to them. This vigorous defense of the requesters' interest was echoed by the *amicus* efforts of Consumer Federation of America, a consumer group with attitudes closely aligned with those of the requesters. Given these facts, and the rights of the manufacturers as determined by the Delaware District Court and the Third Circuit, the District of Columbia Circuit's decision should not be permitted to stand.

ARGUMENT

I. NO JUSTICIABLE CASE OR CONTROVERSY IS PRESENTED WHERE AN AGENCY THAT IS PERMANENTLY ENJOINED FROM RELEASING INFORMATION AGREES WITH FOIA REQUESTERS THAT THE INFORMATION SHOULD BE RELEASED.

Judge Richey determined that this litigation did not present the "case" or "controversy" required under Article III of the Constitution because both the requesters and the CPSC, the only defendant against which relief is or can be sought, have always agreed that the information at issue should be released. The Court of Appeals' reversal of this holding is inconsistent with this constitutional provision and, accordingly, cannot be allowed to stand.

Under Article III the jurisdiction of federal courts is restricted to actual "cases" or "controversies." The reasons for this limitation are simply stated:

> "Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine." *Flast* v. *Cohen,* 392 U.S. 83, 94-95 (1968).

As an aspect of this dual function, the term "case or controversy" implies the existence of "adverse parties whose contentions are submitted to the court for adjudication." *Muskrat* v. *United States,* 219 U.S. 346, 357 (1911). Accordingly, ever since *Lord* v. *Veazie,* 49 U.S. (8 How.) 251 (1850), it has been settled that where parties "desire precisely the same result . . . [t]here is . . . no case or controversy within the meaning of Art. III of the Constitution." *Moore* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 48 (1971) (*per curiam*). *Accord, Muskrat* v. *United States, supra,* 219 U.S. at 361; *Chicago & Grand Trunk*

Railway v. *Wellman,* 143 U.S. 339, 345-46 (1892); *Granfield* v. *Catholic University of America,* 530 F.2d 1035, 1045 (D.C. Cir.), *cert. denied,* 429 U.S. 821 (1976); *Delaware Women's Health Organization, Inc.* v. *Wier,* 441 F. Supp. 497, 500-01 (D. Del. 1977); *Atlantic Richfield Co.* v. *FTC,* 398 F. Supp. 1, 8 (S.D. Tex. 1975), *aff'd on other grounds,* 546 F.2d 646 (5th Cir. 1976); *Dworman* v. *Mayor of Morristown,* 370 F. Supp. 1056, 1079-80 (D.N.J. 1974). It is under this principle that collusive suits must be dismissed, *e.g., United States* v. *Johnson,* 319 U.S. 302, 304-05 (1943) (*per curiam*), as must litigation between parties that have ceased to be adverse because they have come under common ownership or control, *e.g., South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U.S. 300, 301-02 (1892); *East Tennessee, Virginia & Georgia Railroad* v. *Southern Telegraph Co.,* 125 U.S. 695, 695-96 (1888); *Cleveland* v. *Chamberlain,* 66 U.S. (1 Black) 419, 425-26 (1861).[11]

The requirement of adverseness assures sound adjudication based on a full presentation of facts and arguments, for it is "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962).

Genuine adversary interest between the parties functions to focus the issues in suits pressed

> "with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast* v. *Cohen, supra,* 392 U.S. at 96-97.

[11] *Cf. Wood-Paper Co.* v. *Heft,* 75 U.S. (8 Wall.) 333, 336 (1869) (case must be dismissed where patent that is subject of litigation has been transferred from defendant to plaintiff during pendency of suit).

The complete record that only a clash of adverse legal interests can provide also prevents courts from relying on one-sided records that fail to furnish "the fullest disclosure of all material facts" and thereby being "misled into doing grievous wrong to the public." *Chicago & Grand Trunk Railway* v. *Wellman, supra,* 143 U.S. at 346. Accordingly, in the "absence of a genuine adversary issue between the parties . . . a court may not safely proceed to judgment . . . [because] 'honest and actual antagonistic assertion of rights' to be adjudicated [is] a safeguard essential to the integrity of the judicial process." *United States* v. *Johnson, supra,* 319 U.S. at 304-05.

The appropriate inquiry is whether the parties' initial pleadings demonstrate an adverseness of interests sufficient to satisfy the Article III requirement that a case or controversy exists between them. *See Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 (1976); *O'Shea* v. *Littleton, supra,* 414 U.S. at 493; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941). In this case, the requesters' complaint and the CPSC's answer make clear that they both desire precisely the same result, namely, release of the information. The District of Columbia Circuit therefore erred in finding a case or controversy and in remanding the action to the District Court to determine whether under the applicable statutes the requesters are entitled to the information.

The requesters' complaint avers their belief that "[t]he requested documents are subject to mandatory disclosure under the [FOIA]" (A. 19, ¶ 13). The complaint also acknowledges that the CPSC completely agrees that the documents should be disclosed (A. 17-18, ¶ 8):

> "On March 28, 1975, defendant Commission determined, *inter alia,* that the requested documents do not constitute exempt information under the Act, 5 U.S.C. § 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety."

Accordingly, Judge Richey accurately found that "[t]he CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case" (A. 26). As the CPSC stated in its answer to the complaint, "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so" (Dist. Ct. Record No. 11, ¶ 13; *see* A. 28 n.14). The only reason the information has not been released to the requesters is because the CPSC has been enjoined from doing so by the Delaware District Court.

As observed by Judge Richey, the direct consequence of the lack of adverseness between the requesters and the CPSC is "the prospect . . . that both the plaintiff and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA" (A. 26). This prospect—indeed, certainty—can scarcely be depended upon to sharpen the important issues raised by the merits with that "clear concreteness provided . . . from a clash of adversary argument" or to produce a complete record "exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *Flast* v. *Cohen, supra,* 392 U.S. at 96-97.

Nevertheless, in its December 22, 1978 opinion (A. 63-86), the District of Columbia Circuit adhered to the holding of its July 5, 1977 opinion (A. 34-49) that a justiciable case or controversy exists between the requesters and the CPSC (A. 72). In its first opinion the court had attempted to circumvent the congruence of interest between the requesters and the CPSC in two ways, neither of which can withstand scrutiny.[12]

1. The court first perceived a supposed disagreement between the requesters and the CPSC defendants as to whether the orders entered in the Delaware litigation either "preclude" or "absolve" the CPSC from providing the requesters with the information sought (A. 42).[13] But not one word in the requesters' complaint or

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[12] The requesters' theory that, notwithstanding the lack of adverseness between them and the CPSC, the Article III case or controversy requirement may be satisfied by their joining as defendants the manufacturers which do disagree with the requesters' view that the documents should be disclosed is plainly incorrect. (*See, e.g.,* Ct. Appls. First Record Order, No. 4, at 16). The District of Columbia District Court was clearly warranted in holding, first, that the requesters had failed to state a cause of action under the FOIA against the manufacturers (A. 29) and, second, that Fed. R. Civ. P. 19 joinder presupposes the existence of jurisdiction over the cause of action (A. 29-30); absent a case or controversy between the requesters and the CPSC, Rule 19 cannot be used to extend the jurisdiction of federal courts (A. 30). *Letmate* v. *Baltimore & Ohio R.R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970); *Anderson* v. *United States,* 217 F. Supp. 814, 815-16 (E.D. Pa. 1963); *see also Tilley Lamp Co.* v. *Thacker,* 454 F.2d 805, 808 (5th Cir. 1972) (Fed. R. Civ. P. 24 cannot be used to create a "jurisdictional bootstrap" by permitting intervention where there is no primary litigation pending to support intervention). Notably, the District of Columbia Circuit did not disagree with these holdings on appeal.

[13] In its *per curiam* opinion denying applications for rehearing, the District of Columbia Circuit suggested that it had, in its July 5, 1977 opinion, also based its finding of a case or controversy on

briefs ever has questioned the meaning of any of the orders entered in the Delaware litigation or their binding effect on the CPSC. Certainly, there can be no disagreement as to whether the permanent injunction now in effect prevents the CPSC from releasing the accident data to the requesters. *See Delaware Permanent Injunction,* 443 F. Supp. at 1163-64. In its December 22, 1978 opinion the Court of Appeals implicitly recognizes this fact by suggesting to the District of Columbia District Court that it "consider enjoining them [the manufacturers] from enforcing their Delaware judgment against the Commission" (A. 86)."

Thus there can be no serious doubt that the Delaware injunction prohibits the CPSC from releasing the documents. If the requesters have any injury to complain of, it arises, not from the actions of the CPSC, but from the action of the Delaware District Court. Under this Court's reasoning in *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), any injury to the requesters resulting from the independent action of the Delaware District Court in issuing the in-

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the CPSC's not releasing the documents even though the Delaware preliminary injunction was, in the court's view, "dead" (A. 59). In that same *per curiam* opinion, however, the court acknowledged that the Delaware preliminary injunction was not "dead" and that it had misunderstood the Delaware "minute order" (A. 55), which had merely "closed out" the case for statistical purposes only.

[14] Also recognizing that there can be no controversy as to the effect of the Delaware injunction is the December 22, 1978 remand order itself (A. 85-86). That order merely directs the District of Columbia District Court to resolve the underlying merits of the case before it, to determine whether the information should be released to the requesters and, in effect, to determine whether the Delaware injunction should have been issued at all (*id.*).

junction (and of the Third Circuit in affirming it) would not create a justiciable case or controversy in this case:

> "The 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.

Where, as here, the named defendant lacks power to provide the relief sought because such power resides in a third party not before the court, there is "not an actual controversy between real parties" and the case thus "lack[s] 'the "exigent adversity" which is an essential condition precedent to federal court adjudication'." *Robinson* v. *Kimbrough,* 558 F.2d 773, 774 (5th Cir. 1977) (*en banc*) (*per curiam*), *quoting Gras* v. *Stevens,* 415 F. Supp. 1148, 1150 (S.D.N.Y. 1976) (three-judge court) (Friendly, J.). *Accord, Merrick* v. *Merrick,* 441 F. Supp. 143, 145-46 (S.D.N.Y. 1977); *Bullock* v. *Edwards,* 403 F. Supp. 913, 917 & n.8 (E.D. La. 1975); *Henrie* v. *Derryberry,* 358 F. Supp. 719, 722 (N.D. Okla. 1973) (three-judge court).[15]

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[15] Thus, for example, it was held in *Robinson* that a complaint alleging the unconstitutionality of a statute authorizing a judge to excuse from jury service a housewife having children 14 years of age or younger must be dismissed because no judge was named as defendant; the only defendants were jury commissioners, who lacked any duty, power, or authority with respect to the statute in question. 558 F.2d at 774. Similarly, it was held in *Gras* that a complaint challenging the constitutionality of a certain provision of the New York divorce law must be dismissed where the defendants, state court justices and the state attorney general and governor, were not empowered to enforce the challenged statute against the plaintiff. 415 F. Supp. at 1151-52. And in *Henrie,* a complaint naming the state attorney general was held not to present a dispute

2. In its first opinion, the District of Columbia Circuit also based its finding of a case or controversy on its perception that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of appellants' [the requesters'] argument that the requested documents should be disclosed" (A. 43 & n.27). Did the Court of Appeals mean to imply by this attack on the *bona fides* of the CPSC's stated position that the Delaware litigation had been the product of some "collusion" between the CPSC and the manufacturers that has escaped the attention of the Chief Judge of the Delaware District Court and a unanimous Third Circuit panel? Most certainly not. The Court of Appeals' charges against the CPSC have no foundation in fact and are totally unjustified.[16] In fact, Judge Latchum, who—unlike the District of Columbia Circuit—was thoroughly immersed in the Delaware litigation, described it as "hotly contested." *Delaware Transfer Denial,* 438 F. Supp. at 210. Clearly, there is nothing in the CPSC's litigation strategy in the Delaware proceedings to support a charge that the CPSC is insincere in its

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between parties having adverse legal interests where it challenged the unconstitutionality of a portion of the Oklahoma abortion statute empowering the state Board of Medical Examiners to revoke or suspend a practitioner's license for conduct contrary to the act but neither the Board nor its members were named as defendants. 358 F. Supp. at 722.

[16] This was made clear to the court in the petitions for rehearing of the July 5, 1977 decision (Ct. Appls. First Record Order, Nos. 13-15 & 17), particularly the petition filed by the CPSC (*id.*, No. 17).

repeatedly expressed desire to release the documents in question.[17]

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[17] Of particular note is the District of Columbia Circuit's completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders ("TROs") and its decision to withdraw its appeal from the preliminary injunction. The need for TROs to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware District Court was certain, and therefore opposition plainly would have been fruitless. Additionally, as noted by the District of Columbia District Court, it was the responsibility of each court entering a TRO in the cases consolidated in Delaware to make an independent determination that a TRO was justified, "and this Court cannot but assume that said responsibility was met" (A. 28). With respect to the decision not to press an interlocutory appeal, the decision to withdraw the CPSC's appeal from the preliminary injunction was not made by the CPSC, but by the Solicitor General, who concluded that the appeal would clearly be futile (Ct. Appls. First Record Order, No. 17, at 12-13). Certainly the District of Columbia Circuit was not also impugning the sincerity of the Solicitor General.

Further, contrary to the District of Columbia Circuit's suggestion, the fact that the CPSC did not press for prompt final hearing in the Delaware litigation does not provide any basis for challenging the *bona fides* of its expressed desire to release the information. Rather, the decision not to press for entry of a final judgment in Delaware stemmed from the CPSC's hope that a favorable decision would be reached in the case of *Pierce & Stevens Chemical Corp.* v. *Consumer Prod. Safety Comm'n,* 439 F. Supp. 247 (W.D.N.Y. 1977) (Ct. Appls. First Record Order, No. 17, at 13-14). In fact, the CPSC's litigation strategy appears completely justified because the Second Circuit reversed entry of a permanent injunction against the CPSC and rendered an opinion favorable to the CPSC's position in the Delaware litigation. *Pierce & Stevens Chemical Corp.* v. *Consumer Prod. Safety Comm'n,* 585 F.2d 1382 (2d Cir. 1978). Earlier, the Second Circuit had affirmed by oral opinion, 578 F.2d 1369 (2d Cir. 1978), the issuance of a preliminary injunction by the district court in *Pierce & Stevens,* again vindicating the Solicitor General's judgment that interlocutory appeal in the Delaware case would have been futile.

A final factor cited by the District of Columbia Circuit to support its attack on the CPSC's sincerity was that it took the CPSC

Inevitably, in its second opinion, the District of Columbia Circuit implicitly retracted its earlier charges against the CPSC, referring to "the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy" (A. 79). Despite this belated retraction, the court reaffirmed without further reasoning its earlier finding of a case or controversy. The plain fact is, however, that neither the vigorous efforts of the CPSC nor those of the *amicus* Consumer Federation of America, both addressing themselves to the merits, have prevented the issuance and affirmance of a permanent injunction which alone is the reason the requesters have not been furnished the information at issue. The Court of Appeals' finding of a case or controversy should not be sanctioned by this Court.

II. INFORMATION IS NOT "IMPROPERLY WITHHELD" WITHIN THE MEANING OF THE FOIA WHEN THE AGENCY DESIRES TO DISCLOSE THAT INFORMATION BUT IS PROHIBITED FROM DOING SO BY A PERMANENT INJUNCTION ENTERED BY A COURT OF COMPETENT JURISDICTION.

In their complaint (A. 15, ¶ 2), the requesters attempted to invoke the subject matter jurisdiction vested in district courts by the FOIA, 5 U.S.C. § 552 (a)(4)(B).[18] That provision states that a district

several months to determine to release the documents to the requesters (A. 43 n.27). Even the requesters, however, recognized that the CPSC needed more time than the rigid FOIA time limits allow in order to review the voluminous documents requested; they themselves agreed to the CPSC's extended timetable (A. 17, ¶ 7). *See* p. 6 n.1 *supra*.

[18] The requesters' complaint referred to the FOIA's jurisdictional grant, which prior to 1974 was contained in 5 U.S.C. § 552 (a)(3) and now appears in 5 U.S.C. § 552(a)(4)(B). The complaint (A. 15, ¶ 2) also purported to invoke jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

The Declaratory Judgment Act only enlarges the range of remedies available in federal courts; it does not extend their subject matter jurisdiction and is, therefore, not an independent basis for jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950).

Nor is the APA an independent grant of subject matter jurisdiction. Jurisdiction to review agency action must be based on 28 U.S.C. § 1331 (1976). *Califano* v. *Sanders*, 430 U.S. 99 (1977). If jurisdiction of a suit brought to compel the release of documents under the FOIA were for some reason premised on § 1331 rather than on the specific jurisdictional grant provided by the FOIA, 5 U.S.C. § 552(a)(4)(B), the question whether documents are "improperly withheld" under the FOIA would nevertheless be dispositive since the standard of review would be whether the agency withholding is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706 (2)(A) (1976). *See Chrysler Corp.* v. *Brown*, —— U.S. ——, ——, 99 S. Ct. 1705, 1725-26 (1979). Accordingly, the manufacturers address their argument solely to the dispositive issue, namely, the proper construction of the FOIA.

court "has jurisdiction . . . to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B). Here, the requesters' complaint fails to state a claim upon which relief can be granted because the information at issue has not been "improperly withheld" within the meaning of that subsection.

As the complaint and the CPSC's answer make clear,[19] it is solely because of the Delaware orders and permanent injunction—now affirmed by the Third Circuit—that the CPSC has been unable to release these documents to the requesters. Accordingly, the "with-

[19] Complaint ¶ 8 (A. 17-18, ¶ 8); CPSC answer ¶ 13 (Dist. Ct. Record No. 11, ¶ 13). *See* discussion p. 24 *supra*.

holding" of the documents, far from being "improper," was mandated by law. In ordering the District Court to determine whether the information should be disclosed, the District of Columbia Circuit did not address and thus implicitly rejected this argument raised below[20] and twice endorsed by the Solicitor General in this Court.[21] This, we submit, was error.

On its face, the statutory term "improperly withheld" would not include information withheld by an agency because of an order of a court of competent jurisdiction enjoining that agency from disclosing that information. There is no statutory basis in the FOIA for concluding that the term should be given other than its plain meaning; nor is there any basis in equity for reaching a different conclusion.

A. Neither the FOIA Itself nor Any Legislative History Suggests that Documents Are Improperly Withheld when the Agency Has Been Permanently Enjoined from Releasing Them.

Neither 5 U.S.C. § 552(a)(4)(B) nor any other provision of the FOIA provides any basis for concluding that the statute contemplates that a judicial decree permanently enjoining disclosure of requested records by an agency can be parlayed into a claim of improper withholding.[22] It defies all reality to believe that the

[20] *See, e.g.*, Ct. Appls. First Record Order, No. 23, at 10-11.

[21] Brief for Fed. Respondents in Opposition, at 6-7, No. 78-1248; Brief for Fed. Respondents in Opposition, at 5, No. 77-508.

[22] *Cf. Linker* v. *Hills*, 453 F. Supp. 556, 561 (S.D.N.Y. 1978) (nonproduction of missing agency documents is not an "improper withholding" under FOIA); *accord, Nolen* v. *Rumsfeld*, 535 F.2d 890 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *Weisberg* v. *Department of Justice*, 438 F. Supp. 492 (D.D.C. 1977); *Exxon Corp.* v. *FTC*, 384 F. Supp. 755 (D.D.C. 1974).

court hearing a FOIA complaint would be allowed, let alone expected, to disregard a final decree of another court barring disclosure of the same requested records by the same agency.

While the statute by its terms does not provide for what are popularly called "reverse-FOIA" suits, both this Court and the District of Columbia Circuit have recognized not only that such suits will lie under the Administrative Procedure Act but also that they are wholly within keeping of the legislative scheme embodied in the FOIA. *See Chrysler Corp.* v. *Brown*, —— U.S. ——, ——, 99 S. Ct. 1705, 1713-14, 1725-26 (1979); *Charles River Park "A," Inc.* v. *Department of Housing and Urban Development*, 519 F.2d 935, 941, 942 (D.C. Cir. 1975). The recognition of the right to bring a reverse-FOIA suit carries with it a concomitant acknowledgement that the suit may succeed and the agency may be enjoined from release of documents. It cannot be believed that on the one hand the FOIA does not bar the right to bring such suits and yet, on the other hand, the same FOIA effectively negates that right by dictating that resulting decrees requiring withholding be ignored.

The decision of the District of Columbia Circuit would require an interpretation of the FOIA which would either eliminate the authority of the federal courts to enjoin the release of information or would permit courts to direct agencies to disregard any injunction which issued in other proceedings. If such a distortion of normal equity powers had been contemplated by 5 U.S.C. § 552(a)(4)(B), one would be entitled to expect that Congress "would have made its desire plain." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944). *See Robertson* v. *Railroad Labor Board*, 268

U.S. 619, 627 (1925); *In re East River Co.*, 266 U.S. 355, 367 (1924); *Panama Railroad Co.* v. *Johnson*, 264 U.S. 375, 384 (1924).

The legislative history of the FOIA in no way suggests that the statute mandates agency violation of a court order forbidding release so as to avoid a charge of improper withholding. To the contrary, the legislative history shows that the statute was designed as a corrective measure directed—not against the courts—but rather against agency abuses of former section 3 of the APA (5 U.S.C. § 1002), which had been "used more as an excuse for withholding than as a disclosure statute" by government officials reluctant to disclose agency records. S. Rep. No. 813, 89th Cong., 1st Sess. 3, 5 (1965) ("S. Rep. No. 813"); *see* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2418, 2422 ("H.R. Rep. No. 1497").[23] Accordingly, the FOIA was intended "to loosen the agency's grip on the data underlying governmental decisionmaking." *Chrysler Corp.* v. *Brown*, *supra*, —— U.S. at ——, 99 S. Ct. at 1712 n.10. To this end, the federal courts were made the final arbiters of what documents agencies need to disclose under the Act. *See* S. Rep. No. 813, *supra*, at 6; 112 Cong. Rec. 13642 (1966) (remarks of Rep. Moss, House sponsor of the FOIA).

[23] Indeed, agencies had cited § 3 of the APA "as statutory authority for the withholding of virtually any piece of information that an official or an agency [did] not wish to disclose," S. Rep. No. 813, *supra*, at 5, and "case after case of improper withholding based on 5 U.S.C. 1002 [§ 3 of the APA] ha[d] been documented" by Congress, H.R. Rep. No. 1497, *supra*, at 5, *reprinted in* [1966] U.S. Code Cong. & Ad. News, *supra*, at 2422.

The committee reports dealing with the jurisdictional grant to the district courts to enjoin "improper withholding" are entirely consistent with the conclusions drawn here that the FOIA erects no impediment to the judiciary's ability to accommodate to an outstanding decree of a coordinate court. Thus the House Report, in pertinent part, states:

> "The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H.R. Rep. No. 1497, *supra*, at 9, *reprinted in* [1966] U.S. Code Cong. & Ad. News, *supra*, at 2426.

Likewise the Senate Report on this subsection focuses on removal of roadblocks to disclosure wrongfully set up by agencies:

> "Subsection (c) [of Pub. L. No. 89-487, § 3, 80 Stat. 250, now codified as 5 U.S.C. § 552(a)(4)(B)] contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel." S. Rep. No. 813, *supra*, at 8.

Finally, in clarifying Congress' original intent in providing judicial review for improper agency withholding, the Senate Report accompanying the 1974 amendments to the FOIA emphasized "that de novo judicial review is available to challenge agency withholding under any provision in section 552"—*not* withholding pursuant to a permanent injunction. S. Rep. No. 93-854, 93d Cong., 2d Sess. 9 (1974).

The sum and substance is that there is no basis in the FOIA itself or in its legislative history for riding

roughshod over a permanent injunction forbidding disclosure of agency records.

B. The FOIA Does Not Set Aside General Equitable Principles Which Provide Sufficient Flexibility To Enable a District Court Exercising Jurisdiction under 5 U.S.C. § 552(a)(4)(B) To Respect a Permanent Injunction of a Coordinate Federal Court.

In addition to the flexibility afforded by the FOIA itself, a court hearing a FOIA action retains its inherent equitable discretion. In *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974), the Court stated:

> "With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." [24]

[24] The manufacturers wish to make clear that there is no need whatsoever for them to rely on the view of some of the lower federal courts that courts may exercise broad equitable discretion under the FOIA to create new substantive exemptions to mandatory disclosure on the basis of a simple balancing of interests. *See Gen. Servs. Adm'n* v. *Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Consumers Union of the United States, Inc.* v. *Veterans Adm'n*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). *But see Halperin* v. *Department of State*, 565 F.2d 699, 706-707 (D.C. Cir. 1977) and *Soucie* v. *David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (district courts may exercise limited discretion under the FOIA only under exceptional circumstances such as great danger to the national interest). The equitable discretion argument discussed above is limited to the narrow and extraordinary circumstances presented by this case. 1 K. Davis, *Administrative Law Treatise* § 5:25, at 378-79 (2d ed. 1978) (since 5 U.S.C. § 552(a)(4)(B) of the FOIA is not a mandatory provision for judicial enforcement, courts retain discretion to exercise FOIA jurisdiction in a manner avoiding clearly inequitable results).

See Hecht Co. v. *Bowles*, 321 U.S. 321, 329 (1944) (a "grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances" (emphasis by the Court)); *accord, Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975) (district courts retain discretion under Williams Act, 15 U.S.C. § 78m(d) (1970), to refuse to enjoin technical violation where Act's purpose and object would not be served by an injunction).[25]

As explained in *Hecht Co.* v. *Bowles, supra*, 321 U.S. at 329:

> "Flexibility rather than rigidity has distinguished [equity jurisdiction]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The distinctive flexibility of equity jurisdiction retained under 5 U.S.C. § 552(a)(4)(B) enables a court to preserve the integrity of judicial orders by respecting a permanent injunction of a coordinate federal court barring disclosure of the very information sought. Such an exercise of equitable discretion would in no way impair a court's ability to give full effect to the mandatory disclosure provisions of the FOIA. In these narrow and extraordinary circumstances, it would serve only to avoid clearly inequitable results.

In short, since there can be no "improper withholding" in the face of a permanent injunction forbidding disclosure, and since an equity court asserting juris-

[25] As stated by the Court in *Rondeau*: "The short of the matter is that none of the evils to which the Williams Act was directed has occurred or is threatened in this case." 422 U.S. at 59.

diction under the FOIA has sufficient flexibility to take that injunction into account, the Court of Appeals erred in reversing the dismissal of the complaint.

III. ESTABLISHED PRINCIPLES OF COMITY AND FINALITY OF JUDGMENTS MANDATE THAT THE REQUESTERS' ACTION NOT PROCEED.

Notwithstanding the entry of the Delaware injunction barring disclosure of the information being sought and thus the lack of a case or controversy or a statutory basis for the action, the District of Columbia Circuit determined that the District Court should proceed to the merits of the requesters' FOIA complaint. This holding runs directly counter to established principles of comity and the finality to be accorded judgments of coordinate federal courts.

The District of Columbia Circuit based its decision on its view that FOIA requesters should never be bound by an order enjoining the government from releasing certain information unless they were parties to the case in which the order was entered. This holding ignores the fact that the government is bound by the order and, if allowed to stand, will render meaningless reverse-FOIA actions because of the impossibility of joining all actual and potential FOIA requesters in such actions.

We shall demonstrate below that the court made a fundamental error in construing the FOIA as giving requesters of information rights outweighing those of submitters of information under statutes such as Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), and 28 U.S.C. § 1391(e). Moreover, the court's decision, far from being required by existing law, ignores numerous cases holding that non-parties such as the

requesters here may be bound by the results of proceedings in which their position was presented to the court, especially when they chose not to participate and the proceedings were in the nature of judicial review of an administrative determination.

A. The District of Columbia Circuit Wrongfully Elevated the Rights of the Requesters Over Those of the Manufacturers by Ignoring the Policies Expressed in Section 6(b)(1) of the Consumer Product Safety Act Prohibiting Disclosure and the Applicable Venue Provision, 28 U.S.C. § 1391(e).

Underlying the District of Columbia Circuit's decision is its perception that, since the District of Columbia is "the venue authorized by the FOIA" (A. 65), a requester's forum choice of the District of Columbia should outweigh the forum choice made by the submitter of information pursuant to 28 U.S.C. § 1391(e) (1976), even in the face of a permanent injunction barring release of the information entered in the submitter's chosen forum (A. 82-83).[26] In so holding, the court misconstrued the objectives of the venue provisions involved and totally ignored the significant rights afforded submitters of information by non-disclosure statutes such as Section 6(b)(1) of the CPSA.

A review of the legislative history of the 1974 amendments to the FOIA reveals that the District of Columbia Circuit completely failed to understand the reason for the addition of the District of Columbia as a forum choice for FOIA litigation. *See* Pub. L. No. 93-502, § 1, 88 Stat. 1561 (1974), amending 5 U.S.C. § 552(a). The

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[26] Of course, the requesters could have suggested to Judge Latchum the possibility of transfer of the Delaware litigation to the District of Columbia. Since they did not do so, they should not be permitted to raise the venue issue now.

Senate report accompanying the amendments makes clear that this action was taken because "defense of litigation in the District of Columbia would be more convenient from the *government's* vantage point." S. Rep. No. 93-854, 93d Cong., 2d Sess. 12-13 (1974) (emphasis added). The District of Columbia was considered an appropriate additional forum because it is the seat of government and the government's attorneys are there. *Id.* at 13. Thus, contrary to the Court of Appeals' interpretation, there is no indication that Congress was concerned with the convenience of the requester (who already could sue where he resided or had his principal place of business or where the agency records were located) or in providing him with a so-called "sympathetic" forum (*see* A. 84) when it added the District of Columbia as a forum choice for FOIA actions.

In sharp contrast to the FOIA venue provision's inclusion of the District of Columbia as a convenient forum for the government defendant, 28 U.S.C. § 1391 (e) gives the submitter of information to the government suing to protect the confidentiality of the information a broad choice of venue, including the right to bring suit in his "home court." The District of Columbia Circuit's undue concern for the interests of FOIA requesters and its desire to intrude into the Delaware proceedings caused it completely to ignore the significant policy of this statutory provision.

Prior to 1962, an action against an agency official normally could only be brought in the District of Columbia—the precise result sought now by the requesters. This restriction placed a "considerable burden" on the plaintiff living in another part of the country, who incurred "great expense and inconvenience [in] conducting litigation far from [his] home." Cates, *Venue*

in Corporate Suits Against Federal Agencies and Officers, 60 Minn. L. Rev. 81, 85 (1975); *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 923 (1957).

In order to remedy this unfairness, in 1962 Congress amended the general federal venue statute by adding what is now subsection (e) permitting citizens to sue the government locally. *See* Pub. L. No. 87-748, § 2, 76 Stat. 744 (1962). The legislative history of this landmark amendment demonstrates that Congress was concerned with broadening the plaintiff's choice of venue in actions brought to review administrative action and viewed the then current state of the law to be "contrary to the sound and equitable administration of justice." S. Rep. No. 1992, 87th Cong., 2d Sess. 1, 3, *reprinted in* [1962] U.S. Code Cong. & Ad. News 2784, 2785, 2786.[27]

The manufacturers should not be penalized for proceeding against the CPSC in the forum authorized by the 1962 amendment which was so clearly intended for their benefit. As this Court recently held, a person aggrieved by the government's determination to disclose

[27] The legislative history of the predecessor bills to Public Law No. 87-748 clearly reveals the importance that Congress attached to this amendment to the general venue provision and the Congressional intent to facilitate the availability of "judicial remedies for the citizen who is aggrieved by the workings of Government." *See* H.R. Rep. No. 1936, 86th Cong., 2d Sess. 3 (1960); *see generally* Proposed Amendments Relating to Venue in Actions Against the United States, Its Officers or Agencies: Hearings on H.R. 10089 before Subcomm. No. 4 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. (1960). As summarized before Congress by Judge Albert B. Maris, Senior Circuit Judge for the United States Court of Appeals for the Third Circuit, "We [judges] think that this is a good bill, that it would help in the administration of justice, would relieve congestion in the [District of Columbia] Courts, and would be fair to litigants." *Id.* at 25.

information may seek judicial review of that determination pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706. *Chrysler Corp.* v. *Brown,* —— U.S. ——, ——, 99 S. Ct. 1705, 1725-26 (1979). Nowhere in *Chrysler* is there any indication that a requester's rights under the FOIA should supersede those of the submitter of the information who is resisting disclosure pursuant to some other statute such as Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1). Indeed, the Court explicitly held in *Chrysler* that any disclosure which would violate a statute (in that case, 18 U.S.C. § 1905) would be enjoinable as "not in accordance with law" within the meaning of the APA, 5 U.S.C. § 706(2)(A). —— U.S. at ——, 99 S. Ct. at 1726.

Here Judge Latchum held that release of the information at issue would violate the CPSC's own enabling statute and the Third Circuit affirmed his permanent injunction, holding that "[n]o lesser measure of relief would serve to protect the interests at stake and vindicate [the manufacturer's legal rights]." *Third Circuit Affirmance,* 598 F.2d at 816. Plainly, the manufacturers' interests cannot be considered less significant than those of the requesters, and the District of Columbia Circuit erred in failing to accord to submitters of information the full measure of their rights under 28 U.S.C. § 1391(e) and this Court's decision in *Chrysler.*

B. The Court of Appeals' Direction to the District Court To Proceed to the Merits of the Requesters' Action and Consider Enjoining the Manufacturers from Enforcing the Delaware Injunction Does Violence to Principles of Comity and the Orderly Administration of Justice.

As the requesters' complaint itself indicates (A. 19, ¶ 11), it was the entry of temporary restraining orders

in the Delaware litigation prohibiting release *pendente lite* of the information submitted by the manufacturers to the CPSC that gave rise to the requesters' suit, since otherwise the CPSC would have released the information to them (Dist. Ct. Record No. 11, ¶ 13; *see* A. 28 n.14). Thus, as noted by the District of Columbia District Court (A. 28-29), from the start the requesters' suit was merely an attempt to countermand the orders entered in the Delaware litigation. The Court of Appeals' direction to the District Court to proceed to the merits of the requesters' case and to consider enjoining the manufacturers from enforcing the Delaware injunction against the CPSC therefore ran directly counter to long-established principles of comity and the orderly administration of justice.[28]

The doctrine of comity requires that one court refrain from duplicating or interfering with the proceedings of another court with prior jurisdiction over the subject matter. "The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results." *Great Northern Railway* v. *National Railroad Adjustment Board,* 422 F.2d 1187, 1193 (7th Cir. 1970). Notions of judicial efficiency and the deference due other courts both militate against duplicative litigation and thus the second case should not proceed. *See Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976).

As noted by the Solicitor General, if the requesters' suit is permitted to proceed, only two results are pos-

[28] Significantly, the Solicitor General has twice stated before this Court his agreement with the manufacturers on this point. *See* Brief for Fed. Respondents in Opposition, at 7-8, No. 78-1248; Brief for Fed. Respondents in Opposition, at 6, No. 77-508.

sible. *See* Brief for the Federal Respondents in Opposition, at 8. The District of Columbia courts may agree with the Delaware District Court and the Third Circuit that the documents need not be disclosed, in which event valuable judicial time will have been wasted in duplicative proceedings. *See Colorado River Water Conservation District* v. *United States, supra,* 424 U.S. at 817. Alternatively, they could order that the documents be disclosed, thus creating a direct conflict with the orders entered and approved by their sister courts. While the second result is the one desired by the requesters, neither would be proper.

This Court has long recognized that principles of comity are particularly applicable where two federal courts are involved. *See Covell* v. *Heyman,* 111 U.S. 176, 182 (1884). Moreover, such principles are especially important where, as here, declaratory and injunctive relief are involved, since such relief "is best administered by one court . . . the one in which the relief was first sought." *ACLU* v. *Laird,* 463 F.2d 499, 501 (7th Cir. 1972) (Stevens, J.), *cert. denied,* 409 U.S. 1116 (1973). As the United States Court of Appeals for the Ninth Circuit held in *Lapin* v. *Shulton, Inc.,* 333 F.2d 169, 172 (9th Cir.), *cert. denied,* 379 U.S. 904 (1964):

> "[F]or a nonissuing court to entertain an action for such relief [from an injunction] would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court (as discussed in Deposit Bank v. Frankfort [191 U.S. 499, 512 (1903)] and System Federation v. Wright [364 U.S. 642, 647 (1961)]) to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

> ". . . [C]onsiderations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there."

Accord, Mann Manufacturing, Inc. v. *Hortex, Inc.,* 439 F.2d 403, 408 (5th Cir. 1971).

Similar reasoning has led federal district courts to refuse to hear actions seeking to enjoin the enforcement of consent decrees fashioned by other courts. *See St. Louis Amusement Co.* v. *Paramount Pictures, Inc.,* 61 F. Supp. 854, 857 (E.D. Mo.), *appeal dismissed per curiam,* 326 U.S. 680 (1945), *aff'd on other grounds,* 168 F.2d 988 (8th Cir. 1948); *Torquay Corp.* v. *Radio Corp. of America,* 2 F. Supp. 841, 844 (S.D.N.Y. 1932). Such actions are analogous to the requesters' FOIA action, which seeks to have the District of Columbia Court order the CPSC to do precisely what the Delaware court has already enjoined it from doing—release the information in question to the requesters. Surely a permanent injunction entered after extended litigation should not be accorded any less deference than a consent decree.

The facts of this case are strikingly similar to those in *Gregory-Portland Independent School District* v. *Texas Education Agency,* 576 F.2d 81 (5th Cir. 1978), *cert. denied,* —— U.S. ——, 99 S. Ct. 1423 (1979), where the United States had obtained an injunction ordering the Texas Education Agency (TEA), *inter alia,* to refuse to fund and accredit those Texas school districts still discriminating on the basis of race. Upon being informed by TEA that its racial makeup was in violation of the order, Gregory-Portland, which had

not been a party to the earlier litigation, filed its own action against the TEA in a different district and obtained a declaratory judgment that it had not discriminated and an order permanently enjoining the TEA from suspending its accreditation or receipt of funding. On appeal the Fifth Circuit held that "because the injunction against TEA interfered with the integrity of the order from the Eastern District, the Southern District Court should have declined jurisdiction." 576 F.2d at 83. The same result should obtain here.

Despite these established principles, the District of Columbia Circuit refused to accord any deference to the proceedings in Delaware and the Third Circuit. None of the grounds advanced by the court for this refusal can withstand analysis.

First, the District of Columbia Circuit held that comity only applies in situations "in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter" (A. 77). Quite to the contrary, it is well established that principles of comity apply even where the plaintiff in the second federal suit was not a party to the first suit. *See, e.g., Gregory-Portland Independent School District* v. *Texas Education Agency, supra,* 576 F.2d at 82; *United States* v. *Citizens National Trust & Savings Bank,* 166 F. Supp. 410, 412 (S.D. Cal. 1958), *aff'd,* 270 F.2d 128 (9th Cir. 1959); *St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 855; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844. Indeed, in *Gregory-Portland,* the plaintiff in the second suit had entirely different interests from the TEA, the main defendant in the original suit. If comity was applicable in *Gregory-*

Portland, it should clearly apply here, where the two litigations involve precisely the same subject matter and raise precisely the same issues, and where the requesters and the CPSC both favor disclosure of the information to the requesters.[29]

Second, the District of Columbia Circuit defined comity in such a way as to suggest that the doctrine should apply only where actions are simultaneously pending in two different courts, not where the first court has come to final judgment (*see* A. 76-77). However, there is no reason for a federal court to accord a final order of another federal court in the same factual dispute any less deference than the existence of on-going proceedings in that court. If anything, it might be expected that the rule would be to the contrary:

> "It is inconceivable that one [federal district court] judge should attempt to nullify the conclusion of his brother already finally reached and formally entered in a case properly before him. Such an act on the part of a dissenting judge or of a different court not in the line of established appellate process, would seem to be an arrogant assumption of superiority not to be tolerated." *Land* v. *Dollar,* 190 F.2d 366, 380 (D.C. Cir. 1951), *cert. dismissed,* 344 U.S. 806 (1952).

Accord, United States v. *Citizens National Trust & Savings Bank, supra,* 166 F. Supp. at 412.[30]

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[29] These facts also distinguish the instant case from the only two authorities cited by the Court of Appeals in support of its position (*see* A. 78 n.47). *See Great Northern Ry.* v. *Nat'l R.R. Adjustment Bd.,* 422 F.2d 1187, 1193-94 (7th Cir. 1970); *Robertson* v. *Department of Defense,* 402 F. Supp. 1342, 1346 (D.D.C. 1975).

[30] The Court of Appeals' brushing aside of *stare decisis* as a ground for deferring to the Delaware litigation (*see* A. 73) ig-

Indeed, Article VI, Section 1 of the Constitution as implemented by 28 U.S.C. § 1738 requires a federal court in one forum to give the same full faith and credit to the judgment of a federal court in another jurisdiction as it would be required to give the judgment of a state court in that jurisdiction. *See Caterpillar Tractor Co.* v. *International Harvester Co.*, 120 F.2d 82, 85 (3d Cir. 1941); *see also Semler* v. *Psychiatric Institute, Inc.*, 575 F.2d 922, 928 (D.C. Cir. 1978). Additionally, deference to another federal court's judgment is required because

> "the matter here is one between two courts of the same sovereignty, the United States of America. If one federal court failed to give effect to the judgment of another federal court the Supreme Court of the United States, as the head of the judicial system of the United States would compel it to do so because 'they are many members yet but one body.'" *Caterpillar Tractor Co.* v. *International Harvester Co., supra,* 120 F.2d at 86.

See Vestal, *The Constitution and Preclusion/Res Judicata,* 62 Mich. L. Rev. 33, 37-38 (1953).

Thus it should not be surprising that the doctrine of comity has been held to apply to final orders as well as to on-going proceedings. *See Gregory-Portland Independent School District* v. *Texas Education Agency, supra,* 576 F.2d at 82; *St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 855; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844. Any contrary result would encourage

nores the principle articulated in *Land* and *Citizens National Trust* that such deference is necessary where the two litigations involve the very same factual controversy.

collateral attacks on judgments and "render the concept of final judgments meaningless." *Prate* v. *Freedman,* 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd,* 573 F.2d 1294 (2d Cir. 1977), *cert. denied,* 436 U.S. 922 (1978); *see Velsicol Chemical Corp.* v. *Monsanto Co.,* 579 F.2d 1038, 1050 (7th Cir. 1978).

Indeed, the District of Columbia Circuit itself has shown great deference to final decisions of other courts, stating, for example, in *Hilton Hotels Corp.* v. *Weaver,* 325 F.2d 1010 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 951 (1964), that it "should not attempt to reexamine the matters considered and resolved by the Third Circuit, a court having authority equal to our own" (footnote omitted).[31] In contrast to its decision in *Hilton Hotels,* here the Court of Appeals not only directed the District Court to redetermine issues already decided by the Delaware Court, but went so far as to suggest that the District Court consider enjoining the manufacturers from enforcing their Delaware injunction against the CPSC.[32] This suggestion further demon-

[31] More recently, the District of Columbia Circuit held that the District Court "should have paid . . . heed" to principles of comity and stayed an FTC subpoena enforcement action during the pendency of proceedings in a pre-enforcement action brought by the subpoenaed party in New Jersey. *FTC* v. *Wearly,* No. 78-1586, slip op. at 4 (D.C. Cir. May 9, 1979), *cited in* [1979] Antitrust & Trade Reg. Rep. (BNA) No. 916, at A-14 (May 31, 1979).

[32] In appropriate circumstances a court first acquiring jurisdiction may enjoin a party before it from prosecuting a later action. However, we have found no support for the District of Columbia Circuit's suggestion that a second court may enjoin a party from enforcing a *judgment* obtained in an earlier action. Indeed, such action would be unwarranted in light of the authorities cited above. The only case cited by the Court of Appeals (*see* A. 86) supports the former and not the latter proposition. *See Steelman* v. *All Continent Corp.,* 301 U.S. 278 (1937), where the first court

strates that the integrity of the Delaware injunction will be severely undermined if the decision below is permitted to stand.

Finally, the Court of Appeals intimated that whatever rationale lies behind comity, the doctrine may not be used to preclude relitigation and should only result in a stay and not the dismissal of a later filed action (*see* A. 77).[33] This simply is not so. Courts have not hesitated to dismiss actions on grounds of comity. *See, e.g., ACLU* v. *Laird, supra,* 463 F.2d at 500; *Lapin* v. *Shulton, Inc., supra,* 333 F.2d at 172; *see also Mann Manufacturing, Inc.* v. *Hortex, Inc., supra,* 439 F.2d at 407-08. Dismissal has resulted even where the plaintiff was not a party to the first action. *See, e.g., St. Louis Amusement Co.* v. *Paramount Pictures, Inc., supra,* 61 F. Supp. at 857; *Torquay Corp.* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844; *see also*

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acquiring jurisdiction in a bankruptcy matter enjoined a party before it from *attempting* to obtain a judgment in a later filed action.

Moreover, even assuming that the Court of Appeals' suggestion could be carried out, the CPSC would still face the risk of a contempt citation issued by Judge Latchum *sua sponte* if it violated his injunction. *See Fletcher* v. *United States,* 174 F.2d 373, 376 (4th Cir.), *cert. denied,* 338 U.S. 851 (1949). At a hearing held immediately after the District of Columbia Circuit issued its first opinion, Judge Latchum explicitly noted that, contrary to the Court of Appeals' understanding, the preliminary injunction he had entered remained in full force and effect and could be enforced by contempt (Ct. Appls. Amending Record Order, Nos. 3 & 8, Exhibit D at 5).

[33] In fact, a stay pending the termination of the Delaware litigation would be of indefinite duration because of the continuing nature of the injunctive relief granted by Judge Latchum and affirmed by the Third Circuit.

Gregory-Portland Independent School District v. *Texas Education Agency, supra,* 576 F.2d at 82.[34]

The District of Columbia Circuit itself affirmed the dismissal of a second action on grounds of comity in *Hilton Hotels Corp.* v. *Weaver, supra,* stating:

> "[W]here a prior decision against the plaintiff on the same issues he raises in the instant case would necessarily be frustrated or obstructed by a present decision in the plaintiff's favor this court will not interfere with a prior decision adverse to the plaintiff." 325 F.2d at 1010 n.1.

Similar reasoning has led courts to transfer actions to other courts where prior litigation on the same subject has taken place, especially where injunctive relief has been involved, because to grant the relief sought "[might] well abrogate the efficacy of the [first court's] injunction and thereby seriously interfere with that court's power to supervise its own continuing decree" and "would be highly injudicious." *Knopf* v. *Colby,* No. 73-4626, slip op. at 16-17 (S.D.N.Y. Nov. 12, 1973); *see Brotherhood of Locomotive Firemen & Enginemen* v. *Central of Georgia Railway,* 411 F.2d 320, 326 (5th Cir. 1969); *see also Jahncke Service, Inc.* v. *OKC Corp.,* 301 F. Supp. 866, 869 (D. Del. 1969); *Randall* v. *Jenkins,* 271 F. Supp. 904, 905 (E.D. Pa. 1967). These cases, taken in conjunction with authorities cited previously, demonstrate that principles of comity require that the requesters' action be transferred to Dela-

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[34] For a more detailed argument as to why the requesters may be precluded from proceeding in the District of Columbia, *see* pp. 52-62 *infra.*

ware if that is possible or else dismissed [35] and that the requesters be relegated to pursuing relief on "whatever remains" of their claims before the Delaware Court. *See Brotherhood of Locomotive Firemen & Enginemen* v. *Central of Georgia Railway, supra,* 411 F.2d at 324.

C. The Requesters Should Be Precluded from Relitigating in the District of Columbia Matters Already Thoroughly Litigated and Finally Determined in Delaware.

While not dispositive of the issues presented by this case, recent decisions of this Court have illustrated the propriety of precluding relitigation of matters already finally determined. *See, e.g., Montana* v. *United States,* —— U.S. ——, ——, 99 S. Ct. 970, 973-74 (1979); *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, ——, 99 S. Ct. 645, 651-52 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 328-29 (1971). Two reasons militate in favor of such preclusion here: (1) the knowing failure of the requesters to take part in the Delaware litigation and (2) the active representation of their interests in the outcome of that litigation by both the CPSC and Consumer Federation of America.

[35] Here dismissal would serve the same end as would transfer, since the Delaware Court has continuing jurisdiction over the manufacturers' actions and the requesters could at any time present their claims to that court, which has specifically stated its willingness to entertain a motion to amend its injunction should this be warranted. Order Denying Defendants' Motion to Alter or Amend Judgment, *GTE Sylvania, Inc.* v. *Consumer Prod. Safety Comm'n,* No. 75-104 (D. Del. Dec. 22, 1977); *see Lapin* v. *Shulton, Inc., supra,* 333 F.2d at 172; *Torquay* v. *Radio Corp. of America, supra,* 2 F. Supp. at 844.

1. The requesters should be bound because they deliberately bypassed ample opportunities to participate in the Delaware litigation.

The need for complete, consistent, and efficient settlement of controversies strongly favors the preclusive effect of a final judgment against persons who knew of the litigation but "purposely bypassed an adequate opportunity to intervene." *See Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 114 (1968).[36] Accordingly,

> "the law is developing a critical eye towards persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it." *Western Shoshone Legal Defense & Education Association* v. *United States,* 531 F.2d 495, 502 (Ct. Cl.), *cert. denied,* 429 U.S. 885 (1976).

Thus, for example, in *Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486, 505-06 (1968), this Court held that challengers of an ICC order whose actions were stayed in deference to similar proceedings in which they failed to participate were precluded from relitigating issues decided in those proceedings. There are a number of lower court cases to similar effect. *See, e.g., Cummins Diesel Michigan, Inc.* v. *The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962); *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel,* 459 F. Supp. 507, 513-16 (S.D. Fla. 1978); *Prate* v. *Freedman, supra,* 430 F. Supp. at 1374.

[36] Contrary to the District of Columbia Circuit's suggestion (*see* A. 82-83), due process requires only that persons have an *opportunity* to be heard. *See Montana* v. *United States,* —— U.S. ——, ——, 99 S. Ct. 970, 974 (1979); *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971).

While the policies underlying these authorities support the general proposition that FOIA requesters with knowledge of reverse-FOIA proceedings will be bound by the results of those proceedings if they had an opportunity to intervene, this case does not require the pronouncement of a general rule because of the particularly compelling facts involved here. These requesters are sophisticated litigation-oriented consumer groups. They were aware of the litigation in nearby Delaware almost from the time of its inception, explicitly referring to it in their complaint (A. 18, ¶ 10). They received numerous direct invitations to participate in the litigation from both the parties and the courts.[37] However, for strategic reasons they chose not to travel the short distance to Wilmington to accept any of these invitations, but instead pursued their own FOIA action in the District of Columbia. *See Third Circuit Affirmance,* 598 F.2d at 799.[38] It was not until after the CPSC had appealed from the entry of the

[37] In dismissing their action, the District of Columbia District Court reminded the requesters of the possibility of intervention in the Delaware litigation (A. 31). Similarly, in denying the CPSC's motion to transfer the Delaware action to the District of Columbia, the Delaware District Court noted the requesters' claimed dissatisfaction with the CPSC's representation of their interests and specifically invited them to intervene. *See Delaware Transfer Denial,* 438 F. Supp. at 212. Additionally, the manufacturers repeatedly have pointed out to the requesters the possibility of intervention, inviting such participation on the merits by the requesters as recently as the appeal in the Third Circuit. *See* pp. 8-9 & n.3 *supra.*

[38] The requesters' refusal to participate in the Delaware litigation based on any claim of hardship could not be substantiated in light of the fact that one of the requesters has sought to intervene in another action pending in the District of Delaware. *See* Motion for Leave To Intervene as Defendants by Consumers Union of the United States, Inc., filed Sept. 23, 1977, *Pharmaceutical Mfrs. Ass'n* v. *FDA,* No. 77-291 (D. Del.). Moreover, the requesters themselves conceded in the District of Columbia Circuit that the inconvenience of the Delaware forum here "may be minimal" (Ct. Appls. First Record Order, No. 4, at 18).

permanent injunction in Delaware that the requesters, in a belated attempt to nullify the Delaware proceedings, finally filed a brief as *amici curiae* with the Third Circuit for the limited purpose of urging that the Delaware injunction be vacated because they had not been parties before the lower court[39]—a point they never raised before Judge Latchum, whether by letter, participation as *amici,* or limited intervention.

[39] Incidentally, in an attempt to "accommodat[e]" FOIA and reverse-FOIA suits (A. 78), the District of Columbia Circuit stated, by way of dictum, that the requesters were indispensable parties under Rule 19(b) to the Delaware proceedings and that the failure to join them mandated dismissal of the Delaware actions (A. 80-81). We know of no reverse-FOIA case (including *Chrysler Corp.* v. *Brown,* —— U.S. ——, 99 S. Ct. 1705 (1979)) where the requester has been joined as a party, much less where a court has held that a requester must be joined under Rule 19. The consequences of such a holding could be profound. First, every reverse-FOIA case in which a judgment has been entered for the submitter without intervention of the requester would be subject to collateral attack. Second, where two requesters reside in different districts, the submitter would be denied a forum or, at the very least, would be forced to bring two lawsuits in order to obtain personal jurisdiction over each requester.

The District of Columbia Circuit's gratuitous comments concerning Rule 19 were made without the benefit of full briefing or argument and are without legal foundation. *See Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 300 (1902). Rather, the Rule 19 discussion appears to have been calculated to influence the decision of the Third Circuit, where the issue had been fully briefed and was about to be argued. In any event, as the Third Circuit itself held, any claim that the requesters' interests under the FOIA were prejudiced by the Delaware proceedings must be rejected because they deliberately refused to intervene even thought they could have done so "without significant burden." *See Third Circuit Affirmance,* 598 F.2d at 799.

Thus, as in *Land* v. *Dollar,* 190 F.2d 366, 375 (D.C. Cir. 1951), *cert. dismissed,* 344 U.S. 806 (1952), this case is merely an attempt to relitigate what has already been decided. Having chosen not to become involved in the Delaware proceedings at the time when their participation would have been most meaningful, the requesters should not now be allowed to undermine the result of those proceedings.

2. The requesters should be bound because their interests in the outcome of the Delaware litigation were adequately represented by the CPSC throughout and also on appeal by Consumer Federation of America.

Non-parties may properly be bound by the result of a litigation if their interests are represented by another who was a party.[40] Such preclusion clearly is consistent with policies favoring conservation of judicial resources and finality of judgments, and several courts have so held.

Thus, in *Southwest Airlines Co.* v. *Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977), eight private airlines sued in state court to prevent Southwest from continuing to operate at a Texas airport after the city of Dallas had unsuccessfully sued in federal court to exclude Southwest from the airport. The federal district court enjoined the state suit and the Fifth Circuit affirmed,

[40] *See generally Expert Elec., Inc.* v. *Levine,* 554 F.2d 1227, 1233 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *Gambocz* v. *Yelencsics,* 468 F.2d 837, 841 (3d Cir. 1972); *Jefferson School of Social Science* v. *Subversive Activities Control Bd.,* 331 F.2d 76, 83 (D.C. Cir. 1963); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Col. L. Rev. 1254, 1255 (1961).

holding that there was sufficient "congruence of interests" between the private airlines and the city for the former to be bound by the latter's failure to exclude Southwest from the airport in the prior federal case, *id.* at 100, and that "the proposition that governments may represent private interests in litigation, precluding relitigation, is clear," *id.* at 98. The court further noted:

> "To allow relitigation by [private] parties would surely defeat the res judicata policies identified above. First, it would add uncertainty to the status not only of Southwest but also of [other entities interested in the outcome of the first litigation]. If courts could second guess another court each time a new litigant, dissatisfied with the previous judgment, filed a new complaint, the respect of the previous parties or of the public toward the courts would inevitably decrease. Third, relitigation would continue to waste judicial resources and time, as it has already in the three post-judgment suits in this controversy. Fourth, Southwest and subsequent litigants would suffer the harassment and expense of still later lawsuits, as well as the possibility of numerous conflicting judgments." *Id.* at 101.

See also Broder v. *Pfizer, Inc.,* [1973-1] Trade Cas. (CCH) ¶ 74,268, at 93,271 (S.D.N.Y. 1972) ("enough is enough").

Similarly, in *Aerojet-General Corp.* v. *Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975), the plaintiff was held to be bound by a prior decision in which it had failed to intervene on the ground that its interests were "closely aligned" with those of the defendant in the first action, despite that defendant's failure to raise in the first case what the

plaintiff viewed as the crucial issue. *See also Roode* v. *Michaelian,* 373 F. Supp. 53, 55 (S.D.N.Y. 1974).

Here the requesters' interest in obtaining access to the information at issue was more than adequately protected. The CPSC is charged by statute to inform the public of consumer product safety hazards, *see* 15 U.S.C. § 2054, and maintains a pervasive "openness" policy of its own choice.[41] Indeed, the former Chairman of the CPSC has testified to the agency's perception of itself as "operating in a fishbowl." Hearings before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 2d Sess., Ser. 83, 91 (1974).[42] With respect to the particular FOIA requests that gave rise to this litigation, the CPSC took the position not only that the information did not come within an exemption to the FOIA, but that it should be disclosed in any event. Moreover, on appeal *amicus curiae* Consumer Federation of America, another consumer group, represented the interests of the requesters on the merits (without objection from the manufacturers).[43] Under the circumstances, the Court of Appeals' concern that the pro-disclosure posi-

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[41] This is reflected in the opening to the agency's official brochure "Take a Close Look: The CPSC Openness Policy" (1976) ("You needn't resort to undercover operations to know what's going on in the U. S. Consumer Product Safety Commission.").

[42] The CPSC also has maintained before federal courts in two different circuits that the statutory provision upon which the manufacturers primarily rely does not apply to FOIA requests, appealing in both cases from decisions adverse to its position. *See Third Circuit Affirmance,* 598 F.2d 790 (lower court's decision affirmed); *Pierce & Stevens Chem. Corp.* v. *Consumer Prod. Safety Comm'n,* 585 F.2d 1382 (2d Cir. 1978) (lower court's decision reversed).

[43] *See* p. 9 & n.5 *supra.*

tion was not adequately represented in the Delaware litigation (*see* A. 13-14) was unwarranted.

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Indeed, the Court of Appeals' decision makes no sense considering the nature of reverse-FOIA proceedings as explicated by this Court in *Chrysler Corp.* v. *Brown,* —— U.S. ——, ——, 99 S. Ct. 1705, 1726 (1979). Such proceedings are in effect appeals from administrative determinations to release information, and thus normal rules governing such administrative appeals should apply. For example, 28 U.S.C. § 2348 provides that persons "whose interests are affected by [an] order of [certain agencies], may intervene in any proceeding to review the order" in a petition for review. If interested parties choose not to participate in review of an agency determination, they should be bound by the results of that review.

Indeed, in *Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486 (1968), this Court held that since

> "[a]ll parties with standing to challenge the [ICC's] action might have joined in the New York proceedings . . . it necessarily follows that the decision of the New York court which, with certain exceptions we have affirmed, precludes further judicial review or adjudication of the issues upon which it passes." 389 U.S. at 505-06 (footnotes omitted).

See also Port of Boston Marine Terminal Association v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 72 (1970).

Additionally, at least one court of appeals has held, based on its interpretation of *National Licorice Co.* v. *NLRB,* 309 U.S. 350 (1940) and *Consolidated Edison*

Co. v. *NLRB,* 305 U.S. 197 (1938), that in an agency antitrust proceeding seeking to vindicate public rights against a private party, non-parties with an interest in the proceeding can be bound if they had notice and an opportunity to intervene. *PepsiCo, Inc.* v. *FTC,* 472 F.2d 179 (2d Cir. 1972) (Friendly, J.), *cert. denied,* 414 U.S. 876 (1973). In *PepsiCo* the plaintiff contended that it could not be ordered to cease and desist from imposing geographical sales restrictions on its bottlers in a proceeding from which the bottlers were absent because its compliance with the order might subject it to a suit by a bottler whose sales territory was invaded. The court rejected this contention, stating:

> "The proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency 'in order to safeguard their interests.' " 472 F.2d at 187-88.

As in *PepsiCo,* it is hard to believe that the requesters may now pursue an action seeking to compel the CPSC to do that which another district court of coordinate jurisdiction, and that district court's appellate court, have held to be in violation of the CPSC's own enabling act. This is particularly so when the Third Circuit has made an explicit finding that "[n]o lesser measure of relief [than the injunction entered by the Delaware court] would serve to protect the interests at stake and vindicate the [manufacturers'] legal right to have the Commission perform its duties under section

6(b)(1) of the Consumer Product Safety Act." *Third Circuit Affirmance,* 598 F.2d at 816."

If the District of Columbia Circuit's decision to allow the requesters in this case to prosecute their FOIA action after having deliberately ignored four years of litigation in Delaware and the Third Circuit is permitted to stand, a submitter of information to the government will never be able to provide sensitive information with any assurance that it or the government would be able to guarantee the confidentiality of the information. The successful prosecution of a reverse-FOIA action will no longer afford the submitter any final relief because a succession of future requesters could file additional suits seeking to compel release of the very same documents, none of them being bound by any of the prior judgments entered in earlier reverse or direct FOIA proceedings because he was not a party to those proceedings.[45] Reverse-FOIA proceedings will therefore

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[44] As the District of Columbia Circuit itself appears to recognize, "when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere" (A. 72).

[45] The District of Columbia Circuit claimed that the manufacturers could have achieved finality in the Delaware proceeding by naming the appellant-requesters as representatives of a defendant class consisting of "all possible requesters" (A. 79). This contention was made *sua sponte* without the benefit of any briefing or argument whatsoever and, in the words of the Solicitor General, "seems difficult to reconcile with the requirements of Fed. R. Civ. P. 23." Brief for Fed. Respondents in Opposition at 8, *citing Indianapolis School Comm'rs* v. *Jacobs,* 420 U.S. 128, 130 (1975). A class of all possible requesters would have been comprised of over two hundred million persons since any individual may at some unspecified future time request the documents at issue. However, a class cannot be defined "unless the description of it is sufficiently definite so that it is administratively feasible for the

become meaningless, a result clearly not contemplated by this Court. *See Chrysler Corp.* v. *Brown, supra,* —— U.S. at ——, 99 S. Ct. at 1726.

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court to determine whether a particular individual is a member." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1760 at 581-82 (1972); *see also Edwards* v. *Schlesinger,* 377 F. Supp. 1091 (D.D.C.), *rev'd on other grounds sub nom. Waldie* v. *Schlesinger,* 509 F.2d 508 (D.C. Cir. 1974); *American Servicemen's Union* v. *Mitchell,* 54 F.R.D. 14 (D.D.C. 1972). Moreover, it is doubtful that any FOIA requesters could have been named as defendants in the manufacturers' reverse-FOIA actions, since only the CPSC could provide the relief sought. Additionally, it would have been impossible to give constructive "notice" to members of the proposed class if such notice had been deemed necessary under Rule 23(d) to protect the absent members' rights. Finally, even joining the defendant class would not have insured finality of the judgment in any case, since even a judgment against a defendant class would have been subject to collateral attack by an absent member on the ground that the class lacked adequate representation. *See Gonzales* v. *Cassidy,* 474 F.2d 67 (5th Cir. 1973).

CONCLUSION

Wherefore, it is respectfully requested that the decision of the District of Columbia Court of Appeals be reversed and that the requesters' complaint be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, ET AL., PETITIONERS

v.

CONSUMERS UNION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	8
Argument:	
The court of appeals erred in directing the district court to adjudicate this case..	14
I. The Freedom of Information Act precludes one federal court from ordering a federal agency to disclose information that another federal court has enjoined that agency from disclosing	15
II. The court of appeals' ruling is contrary to settled principles of judicial comity..	18
III. None of the arguments offered by the court of appeals justifies its conclusion that the District of Columbia district court should adjudicate this controversy	24
A. Principles of comity apply to subsequent suits brought by nonparties to the original suit	24
B. The interests of FOIA requesters do not warrant an exception to the ordinary principles of judicial comity	32

Argument—Continued Page

C. The possible availability of procedural devices to the parties in the Delaware proceedings does not justify duplicative and potentially conflicting litigation in the District of Columbia 39

Conclusion 45

CITATIONS

Cases:

Atkins v. *State Board of Education*, 418 F.2d 874 23
Baker v. *Carr*, 369 U.S. 186 22
Blonder-Tongue v. *University Foundation*, 402 U.S. 313 25
Carbide & Carbon Chem. Corp. v. *United States Industrial Chem., Inc.*, 140 F.2d 47 18
Charles River Park "A", Inc. v. *HUD*, 519 F.2d 935 37
Chrysler Corp. v. *Brown*, No. 77-922 (Apr. 18, 1979) 4, 9, 17, 38
Colorado River Water Conservation District v. *United States*, 424 U.S. 800..... 18, 19, 28, 30
Deposit Bank v. *Frankfort*, 191 U.S. 499.. 26
EPA v. *Mink*, 410 U.S. 73 ..... 9, 17
Federal Open Market Committee v. *Merrill*, No. 77-1387 (June 28, 1979) 16
Humphries v. *Tann*, 487 F.2d 666 (6th Cir. 1973), cert. denied, 416 U.S. 956.. 29
Hunter v. *Ohio ex rel. Miller*, 396 U.S. 879 23

Cases—Continued Page

Indianapolis School Commissioners v. *Jacobs*, 420 U.S. 128 42
Kerotest Mfg. Co. v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180 ....10, 12, 18, 19, 24, 36
Lapin v. *Shulton, Inc.*, 333 F.2d 169 ..... 26, 31
Montana v. *United States*, No. 77-1134 (Feb. 22, 1979) 25
Pasadena City Board of Education v. *Spangler*, 427 U.S. 424 16
Penn General Casualty Co. v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189.... 10, 11, 19, 21, 25, 29
Pierce & Stevens Chemical Corp. v. *CPSC*, 585 F.2d 1382 38
Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 27
Robertson v. *Department of Defense*, 402 F. Supp. 1342 18
Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 25
Southwest Airlines Co. v. *Texas International Airlines*, 546 F.2d 84, cert. denied, 434 U.S. 832 27
Steelman v. *All Continent Corp.*, 301 U.S. 278 ..... 18, 31
System Federation No. 91 v. *Wright*, 364 U.S. 642 27
Torquay Corp. v. *Radio Corp. of America*, 2 F. Supp. 841 28
United States v. *Citizens National Trust & Savings Bank*, 166 F. Supp. 410, aff'd, 270 F.2d 128 28
United States v. *Swift & Co.*, 286 U.S. 106 27
Walker v. *Birmingham*, 388 U.S. 307..... 9, 16

Constitution, statutes and rules: Page

United States Constitution, Article III 21, 22
Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*:
15 U.S.C. 2055 ..... 4, 8
15 U.S.C. 2055(b) 39
15 U.S.C. 2055(b)(1) 20
15 U.S.C. 2076(b)(3) 3
Freedom of Information Act, 5 U.S.C. 552 ..... 3, 15
5 U.S.C. 552(a)(3) 15, 20, 29
5 U.S.C. 552(a)(4)(B) 2, 8, 9, 15, 16, 18, 26, 38, 41
5 U.S.C. 552(a)(3) 20, 29
5 U.S.C. 552(b) 15
5 U.S.C. 552(b)(3) 8, 12, 20, 36, 39
Privacy Act of 1974, 5 U.S.C. 552a 35
Trade Secrets Act, 18 U.S.C. 1905 4
28 U.S.C. 1391(c) 42
28 U.S.C. 1391(d) 39
28 U.S.C. 1404 6
28 U.S.C. 1404(a) 42
42 U.S.C. 822 28
Fed. R. Civ. P. 19 ..... 8, 13, 22, 40, 43
Fed. R. Civ. P. 19(b) 41, 43, 44
Fed. R. Civ. P. 22 40
Fed. R. Civ. P. 23 42
Fed. R. Civ. P. 23(c)(2) 42
Fed. R. Civ. P. 23(c)(3) 42
Fed. R. Civ. P. 23(d) 42
Fed. R. Civ. P. 23(e) 42
Fed. R. Civ. P. 24(a)(2) 27
Fed. R. Civ. P. 60(b) 27

Constitution, statutes and rules—Continued Page

Fed. R. Civ. P. 60(b)(5) 26
Fed. R. Civ. P. 60(b)(6) 26

Miscellaneous:

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) 17
Note, *Collateral Estoppel of Non-Parties*, 87 Harv. L. Rev. 1485 (1974) 25
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 17

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No. 78-1248

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (A. 63-86) is reported at 590 F.2d 1209. The initial opinion of the court of appeals (A. 34-49), which this Court vacated (see 434 U.S. 1030), is reported at 561 F.2d 349. The opinion of the district court (A. 21-31) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1978. The petition for a writ of

certiorari was filed on February 12, 1979, and was granted on May 14, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioners, who had submitted accident reports to the Consumer Product Safety Commission under claims of confidentiality, filed suits consolidated in the United States District Court for the District of Delaware to enjoin the Commission from disclosing those reports to respondent Consumers Union and others who had requested disclosure under the Freedom of Information Act. The district court issued a permanent injunction prohibiting disclosure of the reports. While the Delaware litigation was pending, respondents Consumers Union and Public Citizen's Health Research Group brought this action in the United States District Court for the District of Columbia to compel disclosure of the reports under the FOIA. The question presented is:

Whether the court of appeals erred in directing the United States District Court for the District of Columbia to adjudicate this case.

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552 (a)(4)(B), provides in pertinent part:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

STATEMENT

In May 1974, the Consumer Product Safety Commission obtained from petitioners, who are television manufacturers (sometimes referred to hereafter as the "manufacturers" or "submitters"), reports of television-related accidents (*e.g.*, fires, electric shocks, etc.), partly through requests and partly through subpoenas issued under 15 U.S.C. 2076(b)(3). Claims of confidentiality accompanied the information submitted by most of the manufacturers (A. 36-37).

One month later, respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group [1] (sometimes referred to hereafter collectively as "Consumers Union" or the "requesters") requested the Commission to disclose the reports under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"). Consumers Union subsequently excluded from its request information protected by the attorney-client privilege and the work-product doctrine and the names and addresses of accident victims (A. 38).

The Commission disclosed portions of the reports as to which no claim of confidentiality had been made;

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[1] Respondents Consumers Union and Public Citizen's Health Research Group are nonprofit organizations. Consumers Union was organized under the laws of the State of New York to provide information on consumer goods and services, and it has several hundred thousand members (A. 15-16).

with respect to the rest, it directed the manufacturers to substantiate their claims of confidentiality. On April 8, 1975, after further communication with the manufacturers and the requesters, the Commission informed the parties of its legal determination that the requested reports were not exempt from mandatory disclosure under the FOIA and that, even if they were exempt from mandatory disclosure, the Commission would exercise its discretion to release them on May 1, 1975 (A. 18, 37-38).[2]

In April and May 1975, petitioners filed "reverse-FOIA" suits[3] in the United States District Court for the District of Delaware and in certain other federal courts, seeking to enjoin the Commission from disclosing the reports. Petitioners contended that disclosure was prohibited by Section 6 of the Consumer Product Safety Act (15 U.S.C. 2055), by exemptions to the FOIA, and by the Trade Secrets Act (18 U.S.C. 1905). Thereafter, all of petitioners' suits were consolidated in the district court in Delaware (A. 39),

[2] The Commission concluded that "[t]he release of the accident data would assist consumers to better evaluate the safety of TVs." See *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328 (3d Cir. Apr. 30, 1979), slip op. 13.

[3] For convenience, we refer in this brief to actions brought against agencies to enjoin disclosure of information by the commonly used term "reverse-FOIA" actions. Technically that is a misnomer, because, as the Court held in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), FOIA is solely a disclosure statute and provides no legal basis for actions seeking to prevent disclosure; such actions must find a basis in other statutes.

and that court issued a series of temporary restraining orders and (in October 1975) a preliminary injunction prohibiting the Commission from releasing the documents pending the litigation (Pet. App. A71-A107).[4]

In the meantime, on May 5, 1975, after petitioners' suits had been filed, Consumers Union and the other requesters instituted this action against the Commission, certain of its members and employees, and petitioners in the United States District Court for the District of Columbia, contending that the FOIA compelled disclosure of the television-related accident reports (A. 14-20).

In September 1975, the district court in the District of Columbia dismissed the requesters' complaint. The court concluded that, in view of the fact that both the requesters and the Commission favored release of the reports, there was no case or controversy, and it therefore lacked jurisdiction (A. 21-31).[5] The court noted that the requesters had declined to intervene in the pending Delaware proceedings and stated that it "in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding" (A. 31). The requesters, however, did not seek to intervene in the Delaware case

[4] The Commission filed a notice of appeal of the preliminary injunction, but it subsequently moved to dismiss the appeal (A. 40).

[5] The court also dismissed the complaint to the extent it sought relief against the submitters on the ground that they did not have custody of the documents in question and therefore that no relief could be granted against them (A. 29-30).

(and have never done so); instead, they appealed the dismissal of their complaint to the United States Court of Appeals for the District of Columbia Circuit.

In July 1977, the District of Columbia Circuit reversed the dismissal of the requesters' FOIA suit (A. 34-49). The court of appeals held first that there was a case or controversy sufficient to satisfy the jurisdictional requirements of Article III—namely, a controversy between the requesters and the Commission as to whether the orders entered in the Delaware case barred the District of Columbia district court from granting relief to the requesters (A. 42-44). Second, the court of appeals held that the pendency of the Delaware proceedings did not prevent the District of Columbia district court from adjudicating the merits of the requesters' FOIA claims because, the court of appeals believed, the Delaware proceedings had terminated. The court also explained its decision by questioning the vigor and sincerity with which the Commission had opposed the manufacturers' suit in Delaware (A. 45-48). The court of appeals therefore remanded the case to the district court with instructions to consider the merits of the requesters' claims (A. 48-49).[6]

[6] After the District of Columbia Circuit's decision, the Commission moved the Delaware district court to transfer the submitters' suits to the District of Columbia district court pursuant to 28 U.S.C. 1404 (Pet. App. A110). The Delaware court denied the motion on the ground that the suits before it were in an advanced stage of litigation and that transfer would unduly delay a determination on the merits (*id.* at A109-A117).

The manufacturers then filed a petition for a writ of certiorari (No. 77-508). On December 8, 1977, while the petition was pending, the Delaware district court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents (Pet. App. A118-A141). On January 16, 1978, in view of this development, this Court granted the manufacturers' certiorari petition, vacated the judgment of the District of Columbia Circuit, and remanded the case to the court of appeals "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware" (434 U.S. 1030).

On remand, the court of appeals ruled that the existence of a permanent injunction in Delaware did not alter its view that a Freedom of Information Act requester, not a party to the Delaware suit, is not barred from litigating its right to the documents in a second forum (A. 63-86). The court reaffirmed its position that a case or controversy exists (*id.* at A. 72) and held that the traditional anti-relitigation bars —stare decisis, collateral estoppel and comity—are inapplicable (A. 73-78). The court below recognized that its holding might effectively nullify any judgment by another court in favor of a "reverse-FOIA" plaintiff, but the court believed that this result could be avoided if the FOIA requester were joined as a defendant in the "reverse-FOIA" lawsuit. The court also suggested that creation of a defendant class made up of all future requesters might solve the problems facing "reverse-FOIA" plaintiffs (A. 79).

With respect to the Commission's concern that litigation of the case in two forums might subject it to inconsistent decrees, the court asserted that there were procedural devices that the Commission could have used to avoid that possibility. In particular, the court observed that the government could have moved to join the requesters under Fed. R. Civ. P. 19 (A. 80-82). The court of appeals thus ordered, for a second time, that the district court proceed with the case on its merits (A. 85-86).

The manufacturers again petitioned this Court for a writ of certiorari. On April 30, 1979, while the petition was pending, the United States Court of Appeals for the Third Circuit affirmed the permanent injunction issued by the Delaware district court, holding that Section 6 of the Consumer Product Safety Act (15 U.S.C. 2055) is a withholding statute within Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) and that it prohibits disclosure of the accident reports in the circumstances of this case. *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328.

SUMMARY OF ARGUMENT

I.

The court of appeals' judgment directing the district court to adjudicate this Freedom of Information Act suit is contrary to a specific provision of FOIA, which states that district courts shall have jurisdiction under the Act to order federal agencies to disclose information "improperly withheld from the complainant." 5 U.S.C. 552(a)(4)(B). An

agency's refusal to release documents in obedience to an injunction of a federal court of competent jurisdiction can in no sense be regarded as "improper" within the meaning of Section 552(a)(4)(B). A party is required to obey an injunction regardless of whether or not he believes it was correctly entered or whether it is later set aside on appeal. See, *e.g.*, *Walker* v. *Birmingham*, 388 U.S. 307 (1967).

Moreover, no purpose of FOIA would be served by permitting one federal court to order an agency to violate the non-disclosure order of another federal court. The central purpose of FOIA was to circumscribe the discretion that agencies had previously exercised in deciding whether to disclose or withhold information from the public. See *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 8-10; *EPA* v. *Mink*, 410 U.S. 73, 79 (1973). When an agency has been enjoined from divulging information on the ground that release is expressly prohibited by statute, it has no further discretion or control over the matter.

II.

The court of appeals' judgment is also contrary to basic principles of judicial comity. The general rule is that courts should refrain from duplicating or interfering with the proceedings and decrees of other courts with prior jurisdiction over the subject matter. This rule is based on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposi-

tion of litigation" (*Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952), and the desire to "avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction * * *." *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).

These important considerations apply with full force in this case. It makes no sense to require the district court in the District of Columbia to adjudicate the same controversy, involving the same documents and the same legal issues, that has already been litigated in the Delaware district court. The upshot of the District of Columbia proceedings will either be an order agreeing with the Delaware court, in which event there will have been a senseless duplication of effort, or an order requiring the Commission to disobey the Delaware court's injunction, in which event this Court's review would be necessary to resolve the unseemly conflict. Indeed, application of the comity principle is particularly appropriate here, because the requesters have never offered any persuasive reason why they could not have asserted and protected their interests by intervening in the Delaware proceeding, as the District of Columbia district court suggested at the outset.

III.

None of the arguments offered by the court of appeals supports its sanctioning of duplicative and possibly conflicting litigation.

A. The court of appeals erred in concluding that principles of comity have no application to lawsuits subsequently brought by non-parties to a prior action. No decision of this Court supports that view. Although principles of collateral estoppel may not apply with full force to strangers to a prior action, the question in this case is not whether the requesters are foreclosed by the Delaware proceedings and decrees from obtaining an adjudication of their own rights under FOIA, but in what court and at what time they should do so. That question is governed by considerations of sound judicial administration, and this Court's rulings have established that those considerations are applicable to suits by strangers to the prior litigation. See *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*.

Although *Penn Central* and several other decisions involving non-parties to a prior action concerned *in rem* or quasi-*in rem* jurisdiction, the Court's reasoning fits this case as well. As the court of appeals recognized, actions seeking to require or prohibit the disclosure of specified information are closely analogous to actions contesting the appropriate disposition of specified property; in either class of cases, exclusive control over the subject matter is essential to the effectuation of a court's judgment.

B. Neither is there merit to the court of appeals' view that a departure from the normal rules of comity and sound judicial administration is warranted by the need to provide adequate protection to the interests and statutory rights of FOIA requesters. The

court's concern that "reverse-FOIA" plaintiffs might otherwise file preemptive suits in "sympathetic" forums is, as this Court stated in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, *supra*, in rejecting the same argument, "hardly a worthy or wise basis for fashioning rules of procedure" (342 U.S. at 185). By the same token, the court's assertion that an agency defending a "reverse-FOIA" action would not present an adequate defense or adequately represent the interests of requestors is unjustified in general and is certainly unsubstantiated by any evidence in this record. Moreover, even if valid in occasional instances, this attack on agency integrity overlooks the fact that requesters may always intervene to represent their own interests in the submitters' action.

There is also no basis for the court's further conclusion that the venue provisions of FOIA reflect a legislative policy in favor of litigating controversies over the disclosure of information in forums convenient to requesters. "Reverse-FOIA" suits are based on other federal statutes (and are brought under venue provisions pertinent to them) allegedly reflecting a paramount legislative policy against disclosure. There is no reason to assume *a priori*—*i.e.*, prior to a judicial resolution of the conflicting claims —that Congress always favors venue for such controversies in courts chosen by the party relying on FOIA. Indeed, because FOIA exempts from mandatory disclosure matters that are "specifically exempted from disclosure by [another] statute" (5 U.S.C. 552(b)(3)), any assumption should be to the contrary.

C. Finally, the court of appeals was incorrect in concluding that the availability to parties in a "reverse-FOIA" action of procedural devices such as joinder of FOIA requesters under Fed. R. Civ. P. 19 should allow the requesters in this case—who assiduously avoided participating in the Delaware action for strategic reasons—to bring a parallel lawsuit in another forum and perhaps to obtain an order requiring the federal agency to disobey the decree of the first court.

Even if the parties to the "reverse-FOIA" action could or should have sought to use the procedural devices identified by the court of appeals, the requesters still have no legal claim under FOIA at this stage, since the Delaware court's injunction is valid and binding, and the agency's compliance with it cannot be labeled as "improper." In any event, whether the use of such devices in a "reverse-FOIA" suit is necessary or proper is a matter that should be decided by the courts directly involved with and most knowledgeable about that litigation—here, the district court in Delaware and the Third Circuit—not by a court sitting elsewhere.

Moreover, while devices such as joinder may be appropriate and desirable in some instances, they may not be in others—for example, where joinder of requesters would be inconvenient or impossible and transfer of the action to another venue would be unfair to the submitters. There is thus no basis for the court of appeals' unyielding rule that joinder of requesters is the required course for "reverse-FOIA"

plaintiffs generally and that a second court may adjudicate the identical legal issue litigated earlier whenever it concludes that the first forum should either have joined all known FOIA requesters or dismissed the action before it.

ARGUMENT

THE COURT OF APPEALS ERRED IN DIRECTING THE DISTRICT COURT TO ADJUDICATE THIS CASE

For the second time the court of appeals has directed the district court to proceed with the adjudication of this case, notwithstanding the pendency of a proceeding involving the identical subject matter in a district court in another circuit with prior jurisdiction over the matter and notwithstanding orders by the latter court (since affirmed by the United States Court of Appeals for the Third Circuit) prohibiting the Commission from disclosing the documents that are at issue. Although the government disagrees on the merits with the decisions of the Delaware district court and the Third Circuit and has been litigating those legal questions against petitioners for four years, we agree with petitioners that the court below has again erred in ordering the District of Columbia district court to adjudicate essentially the same controversy, with the same documents and the same issues, as that involved in Delaware.

Our submission rests on two related considerations. First, adjudication of this case by the District of Columbia district court would be contrary to a specific provision of the Freedom of Information Act, which authorizes federal courts to order disclosure only of information "improperly withheld" (5 U.S.C. 552(a)(4)(B)). An agency's withholding of documents in obedience to the orders of another federal court of competent jurisdiction is plainly not "improper." Second, adjudication of this case by the District of Columbia district court would be contrary to elementary principles of judicial comity—principles that may be regarded as reflected in Section 552(a)(4)(B).

I. The Freedom of Information Act Precludes One Federal Court from Ordering A Federal Agency to Disclose Information That Another Federal Court Has Enjoined That Agency From Disclosing

The Freedom of Information Act, 5 U.S.C. 552, provides that each federal agency "shall make available to the public" certain information, including "records" held by the agency (5 U.S.C. 552(a)(3)), and establishes procedures for making such information available. The Act also establishes nine categories of information to which FOIA and its mandatory disclosure requirements do not apply. 5 U.S.C. 552(b). The district courts are given jurisdiction to enjoin an agency from refusing to provide records sought under the Act, but only if the records are "improperly withheld." 5 U.S.C. 552(a)(4)(B) provides in pertinent part (emphasis supplied):

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or

> in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records *improperly withheld* from the complainant.

See *Federal Open Market Committee* v. *Merrill*, No. 77-1387 (June 28, 1979), slip op. 11.

Under Section 552(a)(4)(B), we submit, a district court has no authority to order an agency to disclose records that another federal court of competent jurisdiction has enjoined the agency from divulging. That is so because the agency's obedience to a federal court order can in no sense be regarded as "improper." Disobedience of such an order would be a contempt of court. Indeed, it is well established that a party who is restrained by a court order must obey it, and may be punished for violating it, even if the order is ultimately held invalid. See *Walker* v. *Birmingham*, 388 U.S. 307 (1967); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976).[7]

[7] Here, as in *Walker* v. *Birmingham*, *supra*, the "court that issued the injunction had, as a court of equity, jurisdiction over the [parties] and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315 (footnote omitted). Although the requesters have argued, in this case and as amici curiae in the Third Circuit, that the Delaware suit should have been dismissed for failure to join them as allegedly indispensable parties—a contention with which we disagree (see pages 43-44, *infra*) and that the Third Circuit has rejected (see *GTE Sylvania, Inc.* v. *CPSC*, No. 78-1328 (Apr. 30, 1979) slip op. 20-22—they have never suggested that the Delaware district court lacked jurisdiction to issue its temporary restraining orders and ultimately its permanent injunction, or that the Commission was somehow excused from obeying those orders, or that the rejection of their joinder argument made those orders "transparently invalid."

The conclusion that FOIA does not authorize one district court to compel a federal agency to disobey the nondisclosure orders of another federal court is supported by the basic purpose as well as the language of the Act. As this Court has recognized, most recently in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), slip op. 6-10, the primary objective of FOIA was to circumscribe the discretion that federal agencies had previously exercised under the Administrative Procedure Act to withhold information from the public. See also *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966). To that end, FOIA limited agencies' discretion to withhold information to nine carefully defined and exclusive categories and subjected their decisions to judicial scrutiny. *EPA* v. *Mink*, *supra*, 410 U.S. at 79. But when an agency has no discretion or control over the matter of disclosure because it has been prohibited from releasing the information by a court of competent jurisdiction, no purpose of the Act would be served by authorizing or requiring another court to order disclosure.

Although petitioners and the Commission argued this point to the court of appeals,[8] the court's opinion

[8] Br. for the Federal Appellees (May 1976) at 7 n.2; Memorandum for the Federal Appellees (Sept. 1978) at 3-5.

To our knowledge, only one other court has suggested that under FOIA one federal court may order the disclosure of

does not address it. We view this as an indication that the court rejected our submission. For the reasons we have stated, this was error.

II. The Court Of Appeals' Ruling Is Contrary To Settled Principles of Judicial Comity

By directing the district court in the District of Columbia to adjudicate a controversy that is the subject of litigation in another federal court with prior jurisdiction, the court of appeals violated not only the express terms of 5 U.S.C. 552(a)(4)(B) but also basic principles of judicial comity. This Court has often recognized the general rule that a federal court should refrain from duplicating or interfering with the proceedings and decrees of another federal court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976); *Kerotest Mfg.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952); *Steelman* v. *All Continent Corp.*, 301 U.S. 278 (1937). As the court of appeals stated in *Carbide & Carbon Chem. Corp.* v. *United States Industrial Chem., Inc.*, 140 F.2d 47, 49 (4th Cir. 1944): "Ordinarily, the court first acquiring jur-

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information that another federal court has prohibited. *Robertson* v. *Department of Defense*, 402 F. Supp. 1342, 1345-1347 (D.D.C. 1975). That suggestion is incorrect for the reasons we have stated, and it appears to have been dictum in any event, since the decision only rejected some of the claims of the submitters for opposing disclosure and granted partial summary judgment for the requester without ordering disclosure. *Id.* at 1349.

isdiction of a controversy should be allowed to proceed with it without interference from other courts."

This basic principle of judicial comity rests on considerations of

> "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952). * * * As between federal district courts * * * though no precise rule has evolved, the general principle is to avoid duplicative litigation.

Colorado River Water Conservation District v. *United States*, *supra*, 424 U.S. at 817. Indeed, with respect to *in rem* or quasi-*in rem* actions (to which the court of appeals correctly analogized the action in this case (A. 72, 80)), this Court's decisions have occasionally characterized the principle in terms of a preclusion of jurisdiction (rather than a discretionary abstention) on the part of courts in which suits involving the same property are subsequently filed. Thus, in *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935), the Court remarked:

> [I]f the two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our

> dual judicial system, * * * and to protect the judicial processes of the court first assuming jurisdiction, * * * the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.

Whether the general rule rests on considerations of sound judicial administration or on jurisdictional limitations, it should apply in this case. In our view it makes no sense to require the district court in the District of Columbia to adjudicate the same issues, involving the same materials, that have been fully and fairly adjudicated by the district court in Delaware and now by the Third Circuit.[9] The only result of that effort would be either that the courts in the District of Columbia would eventually agree with the Third Circuit on the merits, thus producing wasteful and unnecessary litigation, or that the courts in the two

[9] There can be no dispute, we submit, that the two proceedings involve the same controversy. Petitioners' suits in Delaware present the question whether the Commission is prohibited from disclosing the television accident reports by Section 6(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(1)) and Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)), while the requesters' suit in the District of Columbia involves the question whether the Commission is required to disclose the identical reports by 5 U.S.C. 552(a)(3). Hence, the question presented in the Delaware suit is subsumed within and controls the question presented in the District of Columbia suit. Obviously, a decision that the Commission is absolutely barred from disclosing the reports by statute is conclusive of the question whether the Commission must disclose the reports to the requesters under the FOIA.

circuits would disagree, thus subjecting the Commission to conflicting orders from which only this Court's review could extricate it. Here, as in *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*, 294 U.S. at 195, adherence to the principle of comity is necessary "[t]o avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction * * *."[10]

[10] Moreover, a holding that the District of Columbia district court should proceed to adjudicate this case would have anomalous results, because in that litigation both the plaintiff requesters and the defendant Commission would be contending on the merits that the reports may and should be disclosed. It was for that reason that the District of Columbia district court concluded that it lacked jurisdiction because there was no case or controversy (A. 25-30).

In both of its decisions the court of appeals held that there was a controversy between the requesters and the Commission sufficient to establish Article III jurisdiction—namely, the dispute over whether the proceedings before and orders of the Delaware district court precluded the District of Columbia district court from adjudicating the case and granting the requested relief (A. 42, 72). Although we originally argued to the contrary, on further reflection we have become persuaded (as we noted in our briefs in response to petitioners' two petitions for a writ of certiorari) that the court of appeals is correct on this point. There was and is a controversy between the requesters and the Commission concerning the effect of the Delaware proceedings sufficient to confer Article III jurisdiction.

However, if this Court were to affirm the decision of the court of appeals that the FOIA litigation instituted by the requesters in the District of Columbia district court must proceed and that that court may grant the requested relief notwithstanding the Delaware injunction, the only remaining issue on remand to the district court would be whether the Commission may and should disclose the reports to the re-

Indeed, application of the principle of comity and avoidance of duplicative litigation is particularly appropriate in this case because the requesters have never offered any substantial or persuasive reason why they could not have adequately asserted and protected their interests by intervening in the Delaware proceeding, as the District of Columbia district court strongly suggested nearly four years ago in dismissing their complaint (A. 31). Although respondents appeared as amici curiae in the Third Circuit to contend that the Delaware action should have been dismissed because of the failure to join them under Fed.R.Civ.P. 19, the Third Circuit, in rejecting that contention, stated (*GTE Sylvania, Inc.* v. *CPSC*, *supra*, slip op. 21):

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questers—an issue (as noted above) on which both parties to the lawsuit agree.

Whether or not such agreement between the parties on the only remaining issue in the case would present a sufficient case or controversy to satisfy Article III jurisdiction is an arguable question. We believe that it would. When litigation presents a controversy between the parties on some controlling issues of law or fact, but the parties agree on other issues of law or fact, a court before final judgment may resolve the disputed issues. The fact that only undisputed issues remain does not deprive the court of jurisdiction to decide the case and to enter a final judgment, although it may mean that judgment will be rendered more quickly. Nevertheless, the litigation that the court of appeals has directed would lack to a substantial extent the "concrete adverseness which sharpens the presentation of issues" (*Baker* v. *Carr*, 369 U.S. 186, 204 (1962)), and the anomaly of that result further supports our submission that the general principle of comity should apply in this case.

> [W]e also note that [the requesters] had adequate notice of this action prior to commencing their own lawsuit and that they could have intervened in the Delaware litigation without significant burden. Amici concede that their decision not to intervene was based on a desire to present their case in a forum that was more convenient and perceived as less hostile to their interests.

This is consistent with the Delaware district court's finding that "[t]he FOIA requesters, although aware of the earlier filed Delaware cases, did not seek to intervene in the instant cases but for 'strategic reasons' filed the D.C. suit instead" (Pet. App. A112 n.9). We can imagine no sound reason for departing from principles designed to foster efficient judicial administration simply to accommodate the forum preferences and litigation strategies of interested non-parties.[11]

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[11] The court below, in concluding that the requesters' failure to intervene in Delaware did not preclude the maintenance of their suit (A. 84-85), stated, among other things, that "[p]reclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation" (A. 84 n.64). If this statement indicates the court's view that the requesters in this case lacked adequate notice of the Delaware proceedings, it is plainly incorrect. There is no dispute that the requesters knew of the Delaware litigation from the outset and had ample time prior to final judgment to intervene in that case and to have their claims adjudicated. In fact, in appropriate, though rare, cases, a non-party has been allowed to intervene even after final judgment and while the case is on appeal (see *Atkins* v. *State Board of Education*, 418 F.2d 874 (4th Cir. 1969)) or on petition for certiorari (see *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969)).

As we now discuss, none of the reasons advanced by the court of appeals supports its rejection of the general rule of comity in this case.

III. None of the Arguments Offered By the Court of Appeals Justifies Its Conclusion That the District of Columbia District Court Should Adjudicate This Controversy

The court of appeals readily acknowledged that its decision would require duplicative litigation of issues that have already been decided in proceedings in the Delaware district court and the Third Circuit and that the resulting relitigation might well subject the Commission to inconsistent decrees (A. 78-79). The court offered several arguments in an effort to justify that unpalatable result and to reject the principle of comity in the circumstances of this case. None of these arguments withstands analysis.

A. *Principles of Comity Apply to Subsequent Suits Brought By Non-parties to the Original Suit*

The court of appeals concluded, first, that principles of judicial comity do not apply to lawsuits brought by persons who were not parties to the original action (A. 77-78). Nothing in this Court's decisions suggests any such limitation on these principles. Rather, the Court has emphasized that rules of comity rest on considerations of "[w]ise judicial administration, * * * conservation of judicial resources and comprehensive disposition of litigation" (*Kerotest Mfg. Co.* v. *C-O-Two Fire Extinguisher Co.*, *supra*, 342 U.S. at 183)—considerations that do not depend upon the

identity of the parties concerned. Perhaps more important in this context, these principles also rest on the need "[t]o avoid unseemly and disastrous conflicts in the administration of our * * * judicial system * * * and to protect the judicial processes of the court first assuming jurisdiction." *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, *supra*, 294 U.S. at 195.

It is of course true that ordinarily a person may not be bound by a judgment rendered in an action to which he was not a party or in privity with a party and that a non-party may subsequently institute his own action even when the relief he seeks would be logically inconsistent with the prior judgment. See, *e.g.*, *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 329 (1971); Note, *Collateral Estoppel of Non-Parties*, 87 Harv. L. Rev. 1485, 1500 (1974). But this limitation on the doctrine of collateral estoppel, grounded in notions of due process, establishes only that non-parties cannot be denied the right to litigate on their own behalf in some appropriate forum. It does not prescribe the particular forum, or procedure, or time, in or by which those rights must be adjudicated, which are questions governed by other rules and principles (such as comity) necessary to any system of orderly disputes resolution.

No one has contended that the requesters could not assert and obtain an adjudication of their own

rights. They could certainly have intervened in the Delaware actions before judgment, since they had ample notice of those proceedings.[12] Moreover, as a general matter we believe that requesters who were not parties to a "reverse-FOIA" action and who are not foreclosed by rules of collateral estoppel may request the "reverse-FOIA" court to modify its injunction prohibiting disclosure when that injunction allegedly impairs their own legal rights and when, as a practical matter, they have no other avenue of relief. See *Deposit Bank* v. *Frankfort*, 191 U.S. 499, 512 (1903); *Lapin* v. *Shulton, Inc.*, 333 F.2d 169 (9th Cir. 1964) (holding that only the issuing court may modify its injunction).[13] But

[12] Indeed, the requesters unquestionably were entitled to assert their FOIA claims by instituting this action in the District of Columbia district court. See 5 U.S.C. 552(a)(4)(B). The fact that legal rules of general application—here, principles of comity and FOIA's limitation of injunctive relief to situations in which agency records are "improperly withheld from the complainant"—dictate that the requesters not prevail in this case does not mean that they have been deprived of an opportunity to assert their rights because of proceedings in another case to which they were not a party.

[13] Whether the requesters in this case or future requesters could obtain a post-judgment adjudication of their rights in the Delaware district court is not presented in this case, because no requester has sought such relief in that court. Fed. R. Civ. P. 60(b)(5) and (6), allowing motions for modification of a judgment where application of the judgment "is no longer equitable" or "for any other reason justifying relief," refers only to motions by parties. But general principles of equity and due process should permit a non-party not bound by collateral estoppel the same access in cases where an injunction allegedly impairs his legal rights and where, as a practical matter, he has no other adequate remedy. Cf. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 646-647 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). Furthermore, a non-party always may seek to intervene for the purpose of moving under Rule 60(b) to modify the judgment. See Fed. R. Civ. P. 24(a)(2).

Although this question is not directly presented here, petitioners have presented a related question, claiming that at least Consumers Union, and perhaps other requesters as yet unknown, are collaterally estopped from relitigating the merits of the Delaware decree, either in Delaware or in any other forum. Petitioners rely on dictum in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 114 (1968), stating that a non-party might "be bound by the previous decision because, although technically a non-party, he had purposely bypassed an adequate opportunity to intervene." They also rely on cases suggesting that in some circumstances non-parties are bound by judgments in cases in which the government has sought to vindicate a public interest, on the theory that the government acted as an adequate representative of all private non-parties. *Southwest Airlines Co.* v. *Texas International Airlines*, 546 F.2d 84 (5th Cir.), cert. denied, 434 U.S. 832 (1977).

We do not address those contentions because they turn on the particular facts of this case concerning the motives and opportunities of Consumers Union and because those facts have not been fully developed or resolved in this record. Furthermore, we believe it is unnecessary to decide whether Consumers Union or other potential requesters are forever barred from seeking to assert their claims under FOIA in the Delaware district court in order to conclude that it was error for the court below to direct parallel litigation in the District of Columbia.

established principles of comity and sound judicial administration require requesters to pursue their rights in that forum and by those means; they should not be allowed to seek an injunction in some other forum that would effectively nullify and create an irreconcilable conflict with an injunction already in existence.

This Court's decision in *Penn General Casualty Co.* demonstrates that principles of comity apply to actions subsequently brought by non-parties to the first action and strongly supports our view that those principles foreclose parallel litigation of this controversy in the District of Columbia. The court in that case invoked considerations of sound judicial administration to prohibit a non-party to a lawsuit from maintaining a subsequent suit in another forum involving the same *res*. Although the Court's opinion articulated the controlling principles with reference to *in rem* and quasi *in rem* proceedings, we believe that the same considerations apply with equal force here.[14] As the court of appeals correctly observed (A. 72, 80), actions seeking to require or prohibit the disclosure of copies of specified documents are in many ways indistinguishable from actions seeking the particular disposition of specified property.[15]

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[14] See *United States* v. *Citizens National Trust and Savings Bank*, 166 F. Supp. 410, 412 (S.D. Cal. 1958), aff'd, 270 F.2d 128 (9th Cir. 1959), and *Torquay Corp.* v. *Radio Corp. of America*, 2 F. Supp. 841 (S.D. N.Y. 1932), in which the courts applied the considerations outlined in *Penn General Casualty Co.* to non-*in rem* actions brought by strangers to the first action.

[15] In *Colorado River Water Conservation District* v. *United States*, *supra*, Mr. Justice Stewart, in a dissent joined by Mr. Justice Blackmun and Mr. Justice Stevens, described *Penn General Casualty Co.* and other cases as involving situations where "exclusive control over the subject matter is necessary to effectuate a court's judgment." 424 U.S. at 822. The point, not controverted by the majority in that case, seems particularly pertinent here. Although information is not a tangible object susceptible to physical control, in a very real sense a court's exclusive control over the disposition of that information is necessary to effectuate its judgment in an FOIA or "reverse-FOIA" action. As the court below remarked (A. 72): "Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere."

In any event, whether or not an FOIA or "reverse-FOIA" action technically qualifies as *in rem* or quasi-*in rem*, the considerations identified in *Penn General Casualty Co.* apply generally to decrees that affirmatively direct or limit the defendant's conduct under the compulsion of an injunction and that are quite different from the kind of judgments involved in most of the cases in which subsequent actions by non-parties to an earlier action have been permitted. In the normal case, when a suit by a non-party to a prior action seeks relief that is merely logically inconsistent with the prior judgment, granting relief does not interfere with judicial processes or conflict with the decree of the first court; although the second suit may require relitigation of many of the same issues, a plaintiff's right to his day in court has generally been held to outweigh that burden. See, *e.g.*, *Humphries* v. *Tann*, 487 F.2d 666 (6th Cir. 1973), cert. denied, 416 U.S. 956 (1974).[16]

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[16] Assume, for example, that A sues B for damages because of injuries suffered in an accident and judgment is given to B. C then sues B for injuries sustained in the same

It is quite another story, however, when the second suit seeks relief that would effectively nullify the decree of the first court by ordering the defendant to disobey that decree and thereby risk incurring sanctions for contempt. In such circumstances, policy reasons militate strongly against permitting the second suit to be maintained in another forum and in favor of requiring the non-party to assert his rights in the original forum, either by intervening in the proceeding before judgment or seeking thereafter to modify the decree.

In unusual cases, particular circumstances may warrant a different assessment of the "combination of factors counselling against [the] exercise [of jurisdiction] * * *." *Colorado River Water Conservation District* v. *United States*, *supra*, 424 U.S. at 818-819. The Court need not now wrestle with defining those circumstances, because they plainly are not present here. As noted above, the requesters were well aware of the pendency of the earlier proceedings in the Delaware district court and could have participated in those proceedings with minimal inconvenience; for

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accident, and judgment is given to C. The second judgment may well be logically inconsistent with the first, but it does not jeopardize the validity or the *res judicata* or collateral estoppel effects of the first judgment. Or, in an analogy closer to home, assume that two requesters bring independent FOIA actions in different courts to obtain the same agency record. One might win and one might lose, despite identical claims and defenses, yet neither judgment would nullify the other or would subject the agency to irreconcilable obligations.

tactical reasons they chose not to do so. While the court of appeals has offered a number of justifications in support of its decision (which we discuss below), in the last analysis the court has simply not answered the obvious and intractable problem presented by its judgment: if the litigation it has ordered in the District of Columbia results in a ruling requiring the Commission to disclose the reports, which court should the Commission obey? [17]

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[17] At the end of its opinion, the court of appeals offered the brief suggestion (A. 86) that the District of Columbia district court "might consider enjoining [petitioners] from enforcing their Delaware judgment against the Commission." We know of no authority for the proposition that one federal court may so flagrantly interfere with the judgment of another federal court of equal dignity. Moreover, even if petitioners were "enjoin[ed] * * * from enforcing their Delaware judgment," the Delaware district court would, one supposes, still be empowered to hold the Commission and its members in contempt for violating the court's decree. The cases cited by the court of appeals (A. 86 n.72) provide no support for its suggestion. *Steelman* v. *All Continent Corp.*, 301 U.S. 278 (1937), held only that a court first acquiring jurisdiction may enjoin a party from *seeking* a judgment in a later-filed suit; it did not hold that one court may enjoin the *enforcement* of another court's judgment, much less that the court *subsequently* acquiring jurisdiction may interfere with the decree of a court with prior jurisdiction. *Lapin* v. *Shulton*, *supra*, is directly contrary to the court of appeals' suggestion; *Lapin* squarely held that principles of comity and sound judicial administration preclude one court from modifying or interfering with another court's injunction.

B. *The Interests of FOIA Requesters Do Not Warrant An Exception to The Ordinary Principles of Judicial Comity*

The principal consideration put forward by the court of appeals to justify its decision was its view that the interests and statutory rights of FOIA requesters would not be adequately served if a judgment in favor of submitters in a "reverse-FOIA" case prevented requesters from relitigating the merits of the agency's disclosure obligations in a forum of their own choosing. In support of this conclusion, the court stated or suggested that (1) submitters would have an unfair advantage because they could always file preemptive "reverse-FOIA" suits in "sympathetic" forums that might be inconvenient to the requesters before the requesters had the opportunity to bring suit to vindicate their rights under FOIA (A. 71-72, 84-85); (2) the agency, as defendant in the "reverse-FOIA" suit, is not likely to represent adequately the rights and interests of requesters (A. 74-76); and (3) FOIA represents a legislative policy in favor of having the issue of disclosure litigated in forums convenient to requesters (A. 84-85).

Before addressing each of the court's views separately, some general observations are in order. There is no question that the interplay between FOIA and other federal statutes that allegedly prohibit the disclosure of certain information in furtherance of other important interests (*e.g.*, confidentiality and personal privacy)—as with the interplay between any statutes enacted to further different and potentially conflicting goals—creates problems of judicial administration.

Resolution of those problems necessarily entails burdens and benefits for different classes of litigants in particular cases. In devising a system of procedures to deal with the inevitable conflicts, the general objective should be to minimize the burdens on the judicial system as a whole and to accommodate the systemic interests of litigants without regard to their identity or status.

In the FOIA context, to be sure, when a concrete likelihood arises that an agency will disclose information, an affected person who opposes disclosure and asserts a statutory right to non-disclosure will generally have an opportunity to seek judicial redress before a requester is able to file suit to compel disclosure. But that fact is not peculiar to FOIA litigation; it is a necessary incident of our judicial system. If there is a concrete likelihood that the government will do something to benefit A but injure B—a likelihood sufficient to create a justiciable case or controversy—only B can at that point seek judicial relief.

There is nothing inherently unfair or inappropriate about this basic rule of procedure or about the general rule that the controversy should be litigated in only one court—the court B has chosen—even if its resolution affects A's interests. Numerous procedural devices have been recognized in judicial decisions, statutes, and the Federal Rules of Civil Procedure to reduce the burdens and possibility of unfairness to A—*e.g.*, rules allowing intervention, joinder, interpleader, and transfer of actions. On occasion these devices may not fully equalize the burdens on A and

B, but that is no reason to reject the sound preference for centralizing litigation in one court, the first to assume jurisdiction.

If A were permitted to litigate the same controversy in another court and to obtain a judgment from that court effectively nullifying the judgment of the first, the burden on the judicial system and all affected parties would be substantial. Not only would it result in duplicative, time-consuming and costly litigation and perhaps require the original plaintiffs to defend a multiplicity of suits throughout the country, but also an original plaintiff who had successfully asserted his statutory rights would have no assurance that the judgment in his favor would ever be given effect.

Furthermore, the court of appeals overlooked what seems to us a very significant consideration. Even with respect to disputes over the disclosure of information, the basic rules outlined above do not necessarily operate to the advantage of opponents of disclosure and to the disadvantage of FOIA requesters. For example, when an agency has refused to disclose information sought under FOIA, on the grounds either that a statute prohibits disclosure or that the document is exempt under the Act and the agency has decided to withhold it as a matter of discretion, it is the requester who has the first opportunity to seek judicial relief in the forum of his own choice. If the rules announced by the court below were applied neutrally to both requesters and submitters—and it is difficult to argue otherwise—sub-

mitters should then be able to file "reverse-FOIA" actions in courts viewed as convenient or favorable to them, despite the earlier institution of the FOIA action. This presumably would require the requester to intervene in the "reverse-FOIA" action or to join "all possible submitters" in his FOIA suit, in order to prevent a judgment in his favor from becoming nugatory.

In short, important considerations of judicial administration and fairness support the general rule, in this context as well as others, that a controversy be litigated in the court first acquiring jurisdiction and that persons whose interests may be affected by that litigation be required to assert those interests in that forum.[18]

[18] The court of appeals' conclusion may have rested on the assumption that this rule would create burdens on the "typical" FOIA requester (who may be thought of as representing the "public interest") that are extraordinary or contrary to legislative policy and that duplicative litigation would not be unduly onerous to the "typical" "reverse-FOIA" plaintiff (who may be thought of as a large corporation with ample resources). But general rules of procedure cannot fairly be devised on the basis of the identities of the parties in a particular case or the presumed characteristics of the parties in the typical case. Moreover, there is no reason why a court's assumptions about "typical" litigants or legislative policy should lead to special rules favoring FOIA requesters. As the court below itself recognized (see A. 70 n.27 (collecting cases)), in many cases FOIA requesters are large corporations or associations seeking information for commercial purposes, and the opponents of disclosure are individual citizens claiming an infringement of their rights under the Privacy Act of 1974, 5 U.S.C. 552a, or some other federal statute. There is no basis to conclude that Congress intended the interests protected by non-disclosure statutes to be sub-

Turning more specifically to the views expressed by the court of appeals, we believe there is no basis for the suggestion that duplicative litigation in courts of the requesters' choosing is warranted by the possibility that the courts picked by "reverse-FOIA" plaintiffs may be "sympathetic" to the latter (A. 84). In the first place, courts selected by requesters may be equally "sympathetic" to their claims, and (as we have already noted (see note 18, *supra*)), there is no principled justification for preferring one group of plaintiffs asserting statutory rights over another. More important, however, it is of questionable propriety to adopt procedural rules of general applicability on the basis of assumed sympathies on the part of federal district courts. As this Court remarked in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, *supra*, 342 U.S. at 185, in squarely rejecting the same argument: "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

Similarly, there is no merit to the court's assertion (A. 75-76) that duplicative litigation in another forum is justified because the agency defending the "reverse-FOIA" suit will not adequately represent the disclosure interests of requesters and, indeed, may have an institutional interest in non-disclosure (A. 75 & n.40). First, even assuming that the agency's interest in resisting a "reverse-FOIA" suit may be

ordinate to the disclosure policies of the FOIA. Indeed, as we discuss in the text, pages 38-39, *infra*, in light of Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)) if any conclusion is to be drawn it would be to the contrary.

less substantial than that of the requesters—an assumption that undoubtedly is sometimes true, but certainly is not always true—that is no reason for allowing parallel litigation in another forum, since requesters can always represent their own interests by intervening in the "reverse-FOIA" suit. Second, there is no factual support for the court's concern that the agency will not have a significant interest in resisting a "reverse-FOIA" suit. Such a suit may be maintained only when there is a solid basis for concluding that the agency is about to disclose certain information notwithstanding the submitters' objections; otherwise there would be no case or controversy, or at the very least the dispute would not be ripe for adjudication.[19] Third, there surely are no grounds in *this* case for concluding that the Commission has not vigorously defended its disclosure decision. The Commission argued in the Delaware district court that release of the television accident reports would not violate the Consumer Product Safety Act, and it took an appeal when the district court rejected its position. Although the Third Circuit also disagreed with the Commission (*GTE Sylvania, Inc.* v. *CPSC*, *supra*), the Second Circuit (at the

[19] See, *e.g.*, *Charles River Park "A", Inc.* v. *HUD*, 519 F.2d 935 (D.C. Cir. 1975). If, in fact, the "reverse-FOIA" suit is collusive and the agency has merely pretended to want to disclose the records in order to secure a judgment ratifying its true intention to withhold, such collusion would negate the jurisdiction of the "reverse-FOIA" court and, if subsequently proved, would be grounds for that court or another court to disregard or set aside the judgment. It has never been suggested that the submitters' suits in Delaware are collusive, and such a suggestion would be frivolous.

Commission's urging) has reached a contrary result in regard to the same legal issue. *Pierce & Stevens Chemical Corp.* v. *CPSC*, 585 F.2d 1382 (1978).[20] Hence, there is no evidence to support the District of Columbia Circuit's claim that the Commission has been "less than vigilant in espousing its putative view that the requested documents should be disclosed" (A. 48).

Finally, the court of appeals is incorrect in concluding (A. 84-85) that FOIA reflects a legislative policy favoring venue in forums favorable to FOIA requesters in controversies concerning disclosure of agency records. The FOIA specifies a number of proper venues in suits brought by requesters seeking to compel agency disclosure,[21] but "reverse-FOIA" suits rely on other statutes—in this case the Consumer Product Safety Act and the Administrative Procedure Act—allegedly prohibiting disclosure. See *Chrysler Corp.* v. *Brown, supra.*[22] Venue for actions based on

[20] The Commission has been authorized by the Solicitor General to file a petition for a writ of certiorari to review the decision of the Third Circuit in order to resolve this conflict.

[21] 5 U.S.C. 552(a)(4)(B) allows FOIA suits to be brought in the district court "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia * * *."

[22] *Chrysler Corp.* held that FOIA itself provides no legal authority for actions seeking to prohibit the disclosure of information and that such actions must be based on some other statute prohibiting disclosure. See note 3, *supra.* Although petitioners' complaints in the Delaware district court relied in part on FOIA, they also relied on other

such statutes includes the district in which the plaintiff resides. 28 U.S.C. 1391(e). Nothing in these statutes or their legislative histories leads to the conclusion that Congress intended the general disclosure policies of FOIA (and the venue provisions pertinent to it) to override the policies reflected in specific nondisclosure statutes (and the venue provisions pertinent to them). Indeed, because FOIA exempts from mandatory release matters that are "specifically exempted from disclosure by [another] statute" (5 U.S.C. 552(b)(3)), when the FOIA and a nondisclosure law collide it would appear that the paramount and controlling legislative policy is against disclosure.

C. *The Possible Availability of Procedural Devices to the Parties in the Delaware Proceedings Does Not Justify Duplicative and Potentially Conflicting Litigation in the District of Columbia*

Although the court of appeals conceded that its decision might "subject [the Commission] to the possibility of inconsistent judgments" and might render the Delaware judgment "nugatory" (A. 79), it concluded that those consequences were warranted because the parties in the Delaware action might have avoided them if, "with some creativity" (A. 80), they

statutes, and the Third Circuit upheld the injunction prohibiting disclosure of the accident reports on the basis of one of those statutes, Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055(b). Although we believe that the Third Circuit erred in its construction of Section 6(b), *Chrysler* does not foreclose petitioners' reliance on that statute.

had invoked available procedural devices to bring all interested persons into one forum. Thus, the court suggested that "[t]he manufacturer-plaintiffs could have named appellant requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters" (A. 79). The court also suggested that the Commission might have filed an interpleader counterclaim against all possible requesters under Fed. R. Civ. P. 22 (A. 80). It relied most heavily, however, on the contention that petitioners or the Commission should have sought to join the requesters in the Delaware proceedings under Fed. R. Civ. P. 19. Indeed, the court volunteered the view that it was improper for the Delaware district court to have proceeded in the absence of the assertedly "indispensable" requesters—a view that the Third Circuit subsequently rejected in its affirmance of the Delaware judgment. *GTE Sylvania, Inc.* v. *CPSC*, *supra*, slip op. 18-22.

The court of appeals' reasoning is somewhat puzzling. In light of the fact that the requesters assiduously avoided appearing as parties in the Delaware proceeding (although they filed a brief as amici curiae in the Third Circuit), it is difficult to see why the failure of the submitters or the Commission to attempt to bring them unwillingly into that forum should redound to the requesters' benefit by permitting them to litigate their claims in another forum and by compelling the submitters to appear in that forum (or any other forum in which a future requester may bring suit) in order to prevent the Dela-

ware judgment in their favor from becoming worthless. But even putting this objection aside, the court of appeals' creative proposals are unpersuasive as support for its judgment.

To begin with, the possible availability of some or all of the procedural devices suggested by the court is irrelevant to the requesters' right to maintain their FOIA suit against the Commission in the District of Columbia. The failure of the parties in Delaware to invoke those devices has no effect on the validity of the Delaware injunction, which the Commission is compelled to obey even if it disagrees with the order on the merits and even if it agrees with the court of appeals that the Delaware action should have been dismissed under Rule 19(b) in the absence of the requesters. As we have argued above (see pages 15-18, *supra*), withholding agency records in compliance with that injunction is not "improper" within the meaning of Section 552(a)(4)(B). Moreover, the question whether the litigants in Delaware should have resorted to the specific procedural remedies identified by the court below in order to protect the interests of non-parties is a matter properly to be decided by the courts directly involved in and most familiar with that litigation—*i.e.*, the district court in Delaware and the Third Circuit (and ultimately this Court) on review.

Second, while the devices suggested by the court of appeals may be appropriate in some cases to resolve economically and fairly the interests of all persons affected by a controversy—and may even have been possible to use in this case—there are obvious prob-

lems and countervailing considerations that the court failed to address. For example, even if the manufacturers had named the requesters as defendants in the Delaware actions, it is difficult to imagine what relief could have been sought against them, since it was the Commission alone that had the information and was about to disclose it. And it is even more difficult to see how an action naming as a defendant class "all those who likely may subsequently make such requests" or "all possible requesters" (A. 79) would conform to the requirements of Fed. R. Civ. P. 23 concerning, *inter alia*, notice to and description of the members of the class. See Rule 23(c)(2), (c)(3), (d) and (e). Cf. *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975).

With respect to the court's principal argument, concerning joinder of requesters under Rule 19, joinder of at least known requesters may be feasible in some cases, but it may be inappropriate or impossible in others. Venue over known requesters may be improper or inconvenient in the forum in which the "reverse-FOIA" action was brought, and transfer of that action to the district in which the joined parties reside may be inconvenient or unfair to the plaintiff who instituted the suit. See 28 U.S.C. 1391(c) and 1404(a).[23]

Furthermore, in some cases Rule 19 may not be applicable to persons who have simply requested in-

[23] In this case, the requesters' resistance to appear in Delaware certainly supported a reasonable inference that that forum was inconvenient to them. Indeed, they argued as much as amici in the Third Circuit. See *GTE Sylvania, Inc.* v. *CPSC, supra*, slip op. 21.

formation from an agency. Rule 19 refers in pertinent part to a person who:

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

A person who has done nothing more than request agency records may not be claiming a legally protected interest in disclosure under FOIA. Or his claim (or his interest in the subject matter) may be so clearly insubstantial as to make it unlikely that he would ever assert it judicially.[24]

Finally, even if a requester should have been joined under Rule 19 in a "reverse-FOIA" suit because he may be "regarded as indispensable" (Rule 19(b)), the failure to join the requester authorizes but does not require the district court to dismiss the action.

[24] Here, to be sure, the requesters' interest is substantial, and they eventually filed their own action, but the court of appeals has announced a general rule regarding the propriety of joining known requesters under Rule 19 in all future "reverse-FOIA" cases. Requesters as yet unknown, of course, cannot in any event be joined, and therefore Rule 19 could never fully protect federal agencies or "reverse-FOIA" plaintiffs from the burdens of duplicative litigation and inconsistent judgments if the court of appeals' conclusions were adopted.

In deciding whether to dismiss for non-joinder, district courts are directed by Rule 19(b) to consider:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In this case, the Third Circuit concluded that these considerations, and particularly the prejudice to petitioners if the Delaware action were to be dismissed, did not warrant dismissal of the action. *GTE Sylvania, Inc.* v. *CPSC, supra*, slip op. 20-22. We fully agree with that conclusion. Even if we were incorrect, however, there is no basis for the District of Columbia Circuit's general view that joinder of known requesters is required in every "reverse-FOIA" action or for its conclusion in this case that a second FOIA court is free to adjudicate the identical controversy, without regard to the obvious and serious dangers inherent in that course, whenever it concludes that the "reverse-FOIA" court should either have joined certain non-parties or dismissed the action before it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1979

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GTE SYLVANIA, INC., *et al.*,

Petitioners,

v.

CONSUMERS UNION
OF THE UNITED STATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
1. Facts Giving Rise to the Litigation	3
2. District Court Proceedings	5
3. Proceedings in the District of Columbia Circuit	9
4. Initial Proceedings in This Court	11
5. Proceedings on Remand in the D.C. Circuit	12
6. Further Proceedings in This Court	14
SUMMARY OF ARGUMENT	16
ARGUMENT	20
I. THERE EXISTS SUFFICIENT ADVERSENESS TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III	20
II. THE FILING OF A COMPLAINT IN DELAWARE DID NOT PRECLUDE THE ADJUDICATION OF THIS CASE IN THE DISTRICT OF COLUMBIA	30
A. In Determining Whether This Case is Precluded by the Delaware Action, the Court's Focus Should Be on the Cases As They Stood When This Action Was Filed, Disregarding The Issuance Of The Automatic Restraining Orders in Delaware	30
B. The Doctrine of Comity Relied on By Petitioners and the CPSC Is Inapplicable	34

Page

1. Because the Requesters Are Not Parties in Delaware, Due Process Precludes the Requesters From Being Bound By A Judgment There 34

2. The Exceptions To The Requirement That The Parties To Both Actions Be Identical Do Not Apply 36

C. Sound Reasons of Policy Support the Conclusion of the Court of Appeals To Decline To Resolve the Question of the Appropriate Forum for this Litigation by a Race to the Courthouse Alone 41

D. More Satisfactory Means Are Available To Decide the Appropriate Forum for Litigation of This Kind . . 47

CONCLUSION 52

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 22, 28

Alemite Mfg. Corp. v. Staff,
42 F.2d 832 (2d Cir. 1930) 51

Amalgamated Meat Cutters v. Connally,
337 F. Supp. 737 (D. D.C. 1971) (three judge court) 23

American Mail Line, Ltd. v. Gulick,
411 F.2d 696 (D.C. Cir.1969) 31

Atkins v. United States,
556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*,
434 U.S. 1009 (1978) 24

Page

Baker v. Carr,
369 U.S. 186 (1962) 16, 22

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 18, 35-36

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 99 S.Ct. 1551 (1979) 40-41

Caldwell Mfg. Co. v. Unique Balance Co.,
18 F.R.D. 258 (S.D.N.Y. 1955) 50

Cheng Fan Kwok v. Immigration & Naturalization Service, 392 U.S. 206 (1968) 24

Chrysler Corp. v. Brown,
99 S.Ct. 1705 (1979) 19, 43

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 47

Commonwealth Edison Co. v. Train,
71 F.R.D. 391 (N.D. Ill. 1976) 50

Diapulse Corp. v. Food and Drug Admin.,
500 F.2d 75 (2d Cir. 1974) 31

Flast v. Cohen,
392 U.S. 83 (1968) 22

Foti v. Immigration & Naturalization Service,
375 U.S. 217 (1963) 24

Great Northern Ry. Co. v. National RR. Adjust. Bd.,
422 F.2d 1187 (7th Cir. 1970) 18, 35

Gregory-Portland Independent School Dist. v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1423 (1979) 36

Page

GTE Sylvania, Inc. v. Consumer Product Safety Comm.,
598 F.2d 790 (3d Cir. 1979) 14-15, 49

GTE Sylvania, Inc. v. Consumer Product Safety Comm.,
438 F. Supp. 208 (D. Del. 1977) 7

GTE Sylvania, Inc. v. Consumer Product Safety Comm.,
404 F. Supp. 352 (D. Del. 1975) 8

Hecht Co. v. Bowles,
321 U.S. 321 (1944) 46

Hunter v. Federal Life Ins. Co.,
111 F.2d 551 (8th Cir. 1940) 26

Illinois Brick Co. v. Illinois
431 U.S. 720 (1977) 48

Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co.,
342 U.S. 180 (1952) 19, 43, 46

Lord v. Veazie,
49 U.S. (8 How.) 250 (1850) 16, 22

Mann Mfg., Inc. v. Hortex, Inc.,
439 F.2d 403 (5th Cir. 1971) 32, 35

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941) 28

Moore v. Charlotte-Mecklenberg Bd. of Educ.,
402 U.S. 47 (1971) 23

Muskrat v. United States,
219 U.S. 346 (1911) 16, 22

North Carolina State Bd. of Educ. v. Swann,
402 U.S. 43 (1971) 23

Page

O'Shea v. Littleton,
414 U.S. 488 (1974) 22

Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) 44

Parklane Hosiery Co. v. Shore,
99 S.Ct. 645 (1979) 36

Pasadena City Bd. of Educ. v. Spangler,
427 U.S. 424 (1976) 17, 23

Penn General Casualty Co. v. Pennsylvania ex rel Schnader, 294 U.S. 189 (1935) 46

Pierce & Stevens Chemical Corp. v. Consumer Product Safety Comm., 585 F.2d 1382 (2d Cir. 1978) . . . 16, 33-34

Poe v. Ullman,
367 U.S. 497 (1961) 29

Provident Tradesmens Bank & Trust Co. v. Patterson,
390 U.S. 102 (1968) 36, 41, 48, 49

Renegotiation Bd. v. Bannercraft Clothing Co.,
415 U.S. 1 (1974) 31-32

Rosengart v. Laird,
405 U.S. 908 (1972) 25

Schlesinger v. Reservists Committee to Stop the War,
418 U.S. 208 (1974) 31

Schwartz v. Internal Revenue Service,
511 F.2d 1303 (D.C. Cir. 1975) 43

Sea-Land Services, Inc. v. Gaudet,
414 U.S. 573 (1974) 36

Page

Semmes Motors, Inc. v. Ford Motor Co.,
429 F.2d 1197 (2d Cir. 1970) 35

Sibron v. New York,
392 U.S. 40 (1968) 25

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 36

State of Montana v. United States,
99 S. Ct. 970 (1979) 18, 37

Trainor v. Hernandez,
431 U.S. 434 (1977) 30

United States v. Johnson,
319 U.S. 302 (1943) 23

United States v. Lovett,
328 U.S. 303 (1946) 16, 24

United Steelworkers of America v. Marshall,
592 F.2d 693 (3d Cir. 1979) 46

Western Union Telegraph Co. v. Pennsylvania,
368 U.S. 71 (1961) 31, 36, 47

Westinghouse Electric Corp. v. Schlesinger,
392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*,
542 F.2d 1190 (4th Cir. 1976), *cert. denied*,
431 U.S. 924 (1977) 42

Constitution & Statutes:

United States Constitution
Article III . . . . . *passim*
Article III, Sec. 2 48

Page

Consumer Product Safety Act
15 U.S.C. § 2051 3
15 U.S.C. § 2055(b)(1) 40

Federal Interpleader Act, 28 U.S.C. § 1335 . . . . . 26, 48

Freedom of Information Act, 5 U.S.C. § 552 . . . . . *passim*
552(a)(3) 4
552(a)(4)(A) 31
552(a)(4)(B) 20, 31, 48
552(a)(4)(D) 9
552(a)(6)(B) 44
552(b)(3) 40

26 U.S.C. § 6110(f) 48

28 U.S.C. § 1391(e) 7

28 U.S.C. § 1404(a) 7, 8, 13, 20, 47, 49, 50, 51

28 U.S.C. § 2112(a) 46

Federal Rules of Civil Procedure:

Rule 4(f) 49

Rule 19 . . . . . 6, 8, 13, 15, 20, 39, 45, 47-51

Rule 19(a) 48

Rule 19(a)(2) 15

Rule 19(b) 50

Rule 19(c) 8, 48

Page

Rule 24 41

Rule 65(b) 7, 38

Other Authorities:

Advisory Committee Notes to Rule 19, 39 F.R.D. 89 (1966) 48

G. English, *Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits*, 1 Admin. L. Rev. 151 (1979) 38

H.R. Rep. 1153, 92d Cong., 2d Sess. (1972) 3

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v.

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BRIEF OF RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP

This case involves the efforts of both the submitters of documents to a government agency and the requesters of those documents seeking access under the Freedom of Information Act to litigate their respective rights to prevent and obtain disclosure in the forum of their choosing. Peti-

tioners, submitters of the information, rely on basically two legal theories – the absence of a case or controversy under Article III of the Constitution and the doctrine of comity (joined only in the latter position by the Solicitor General) – in arguing that they have an absolute right to choose the forum for deciding this dispute because they won a race to the courthouse which, under their terms, the requesters would inevitably lose. Because neither legal doctrine is applicable here, and, because the solution offered by the Court of Appeals provides the best opportunity to resolve what the Solicitor General concedes is a difficult problem in judicial administration, the judgment below should be affirmed.

QUESTIONS PRESENTED

1. Does anything in Article III of the Constitution preclude a federal court from adjudicating a dispute where there is sufficient adverseness among the parties to ensure that all of the legal issues are presented in a concrete manner?

2. In selecting a forum to decide whether documents submitted to a government agency must be disclosed under the Freedom of Information Act, where the contest is between the submitter and the requester, must the court always select the forum in which the first party files?

STATEMENT OF THE CASE

1. Facts Giving Rise to the Litigation.

The respondent Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to the Consumer Product Safety Act, 15 U.S.C. §2051, *et seq.*[1] Its purpose is to implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." H.R. Rep. 1153, 92d Cong., 2d Sess. 26 (1972). Pursuant to its statutory mandate, the CPSC began an investigation in the spring of 1974 into accidents arising out of the manufacture and use of color television sets. To obtain the necessary information, it asked that all manufacturers of television sets sold in the United States submit to it all accident reports collected after the National Commission on Product Safety held hearings on the subject in 1969. 39 F.R. 10929 (March 22, 1974). (A. 36). Although a few manufacturers complied, the Commission determined that the response was insufficient, and accordingly it issued a special order on May 13, 1974, requiring various manufacturers, including the twelve who are petitioners in this Court, to make further submissions. *Id.* The Commission advised the manufacturers that their responses might be subject to disclosure under the Freedom of Information

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[1] Although formally denominated a respondent in this Court, the CPSC has aligned itself with the petitioners in arguing that the decision below was in error, except that it has not urged that there is no case or controversy as argued in Point I of petitioners' brief. *But see* Brief of CPSC at 21, n. 10. Despite their alignment with the petitioners, we will refer to the CPSC and its members, all of whom were joined as defendants in this action, collectively, as the "CPSC," the "Commission" or the "federal respondents."

Act, 5 U.S.C. §552 ("FOIA"), and asked them to designate which documents they believed were confidential. (A. 22, 37).

On June 14, 1974, respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (the "requesters") wrote the CPSC seeking access to the reports which had been submitted. (A. 16). Because a number of the manufacturers had claimed confidentiality, the request was denied as to any reports for which such a claim was made. (A. 37). However, because the CPSC concluded that the manufacturers had not sufficiently documented their claims, the Commission so advised them in August 1974 and asked for further substantiation. (A. 22, 37). Despite the fact that the requesters had the right to sue immediately under the FOIA because the documents had not been "promptly" disclosed, 5 U.S.C. §552(a)(3), they chose instead to let the administrative process take its full course. In addition, they also narrowed their request to exclude both matters within the attorney-client privilege and the names and addresses of accident victims. (A. 17).

In the interim, the manufacturers and the CPSC had a number of exchanges regarding both the responsiveness of the manufacturers to the special orders and the adequacy of the substantiation offered for their nondisclosure claims. The requesting parties still chose not to sue. Instead, on November 5, 1974, they met with officials of the CPSC to discuss the processing of their FOIA request. At that meeting the agency informed the requesters that it was anticipated that a decision on disclosure would be made by mid-March 1975. Therefore, on November 18, 1974, the requesters notified the CPSC that they would not exercise their right to sue on the understanding that their request would be processed as promised. They specifically reserved the right to sue should any further delay result. (A. 17).

On March 28, 1975, the CPSC announced that it had concluded that none of the requested documents fell within any of the exemptions to the FOIA, and therefore they were subject to mandatory disclosure. In addition, the CPSC found that, even if the documents fell within an exemption, the public interest in health and safety required that the documents, as redacted to eliminate the names and addresses of accident victims and attorney-client information, should be made available. However, instead of releasing the documents immediately, the CPSC gave the manufacturers until May 1, 1975, to obtain any needed relief from the courts. (A. 17–18, 38).

2. District Court Proceedings

Although the mid-March deadline for disclosure had not been met, the requesters still chose not to sue. And, when the CPSC announced its decision not to release the documents until May 1st, they did not go to court to contest the additional delay. Instead, they awaited the decision of the manufacturers, again in the hope of avoiding litigation.

Having the choice between disclosure and litigation, thirteen manufacturers took the latter option, bringing suits in four different jurisdictions. Eight of the manufacturers originally filed in Delaware, three in the Southern District of New York, and one each in the Northern District of New York and the Western District of Pennsylvania. (A. 18). In each case the submitters obtained a temporary restraining order prior to the May 1 deadline, either with the consent of the CPSC or by court order. Thus, the documents pertaining to those companies which sued were not released, but those from the others were made available.

The requesters were then faced with a difficult choice: they could do nothing and allow the CPSC to represent their interests; they could seek to intervene in Delaware;

or they could file their own suit in the District of Columbia. In considering their options, they recognized that intervention in Delaware would be far less convenient than litigating in the District of Columbia where their counsel had offices and where both groups maintained their staffs. They also believed that, on balance, their likelihood of success in the District of Columbia was greater than in Delaware, particularly since the latter court had already granted petitioners temporary restraining orders. Furthermore, at that time, actions were pending in four different jurisdictions which might have entailed multiple interventions if that path had been chosen.

The requesters were also aware that although the inconvenience was not extraordinary in this case, the next case might involve a reverse FOIA action filed in Hawaii, for which the problems of cost and accessibility would be much greater. Since both requesters had long-standing interests in access to information, not simply from the CPSC, but from many government agencies, they concluded that intervening in Delaware would set an adverse precedent and that this case offered an opportunity to establish that submitters of information could not automatically elect the forum in which contests such as this would be decided.

It was for these reasons that the requesters chose to bring suit on May 5, 1975, in the United States District Court for the District of Columbia. (A. 1). In addition to naming the CPSC, its members, and its Executive Director as defendants, the requesters joined all thirteen manufacturers who had previously filed suit as additional defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. (A. 16).

Subsequent to that date, the federal defendants in the five actions which were not brought in Delaware moved to have those cases transferred to the District of Delaware,

where the other suits had been filed, and where, fortunately for the CPSC, all thirteen manufacturers are incorporated. (A. 39). Although eight of the manufacturers had elected to sue in Delaware, it is not the principal place of business of any of them, nor of any of the other five. Moreover, all of the requested documents were physically in Washington, D.C., none of the principal witnesses were in Delaware, and all of the principal counsel for both the CPSC and the submitters were either in Washington or elsewhere besides Delaware. Although the government could have moved to transfer all thirteen actions to the District of Columbia pursuant to 28 U.S.C. §1404(a), since venue would also have been proper there under 28 U.S.C. §1391(e),[2] it did not even attempt to do so and thereby consolidate the reverse cases with the direct FOIA action brought by the requesters. Thus, the five non-Delaware cases were all transferred to Delaware and consolidated with the eight pending there.[3] Moreover, despite the fact that Rule 65(b) of the Federal Rules of Civil Procedure provides that temporary restraining orders shall last only ten days, plus a single ten-day extension, the CPSC consented in every case to continue them until the hearing on the motions for the preliminary injunction, which did not occur until July 23, and then until the court could decide those motions.

In addition to failing to attempt to consolidate all of the pending litigation, including that brought by the requesters, in a single forum, the CPSC also failed to make any effort

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[2] *See GTE Sylvania v. Consumer Product Safety Comm.*, 438 F. Supp. 208, 210-211 (D. Del. 1977) (Pet. App. A111).

[3] One of the cases was subsequently dismissed voluntarily, and hence there are only twelve submitters remaining. (Pet. App. A109, n. 1).

to join the requesters in Delaware under Rule 19. The submitters had neither named the requesters in their complaint, nor explained their absence as Rule 19(c) requires, and neither the CPSC nor the court carried out their independent responsibilities to attempt to bring all parties into the Delaware forum to litigate the issues there. Instead of utilizing either section 1404(a) or Rule 19, the manufacturers and the CPSC moved in the District of Columbia to dismiss this action or to hold it in abeyance pending the outcome of the proceedings in Delaware. As grounds for dismissal, they urged that, despite the presence of the manufacturers, there was no case or controversy under Article III of the Constitution with respect to the underlying cause of action because the CPSC and the requesters agreed that the documents were not exempt from disclosure. In addition, both the submitters and the government argued that because the Delaware actions were filed first, and there were temporary restraining orders outstanding in them, the District of Columbia case should be stayed until the cases in Delaware were decided. The requesters responded to these motions, and on June 30, 1975, filed their own motion for summary judgment. (A. 2).

Without hearing oral argument, the District Court agreed with the defendants, and on September 11, 1975, issued its opinion and order dismissing the case on the ground that there was no case or controversy with respect to the CPSC. (A. 26). It further concluded that there was no cause of action or independent basis of subject matter jurisdiction with respect to the manufacturers and hence that the case could not proceed against them either. (A. 29). Shortly thereafter, on October 23, 1975, the District Court in Delaware entered an order preliminarily enjoining the CPSC from release of the documents. *GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352 (D. Del. 1975) (Pet. App. A71-107).

3. Proceedings in the District of Columbia Circuit

The requesters promptly appealed to the United States Court of Appeals for the District of Columbia Circuit, both because of their belief that the decision below was erroneous and because of the adverse precedent that it would set with respect to future forum shopping contests between submitters and requesters. Thus, on November 3, 1975, they filed a motion for summary reversal which was denied without opinion on February 19, 1976. (A. 5-6). Subsequently, briefs were filed on the merits, and on September 21, 1976, the court of appeals heard oral argument pursuant to the expedited review provisions of the FOIA, 5 U.S.C. §552(a)(4)(D).

More than nine months later, on July 5, 1977, the appellate court issued its opinion, written by Judge Wright, joined by then Chief Judge Bazelon and Judge Robinson, reversing the decision of the district court and directing the court to proceed to the merits of the controversy. With respect to the claimed absence of a case or controversy, the court noted that the CPSC had not given the requesters access to the documents, and that, at least as to the effect of the temporary restraining orders in Delaware, there was a genuine dispute between the CPSC and the requesters. (A. 42). It thoroughly reviewed the history of the case and concluded that the requisite adverseness for Article III purposes was present. (A. 44).

The court then considered the remaining comity argument which had been advanced by the defendants below but had not been reached by the district court. It observed that in the nearly two years since the preliminary injunction had been entered in Delaware, nothing further had taken place. (A. 45). The court noted that, although the CPSC's appeal from the preliminary injunction had been dismissed, no one had proceeded to obtain a final judgment.

Id. The court then pointed out that nearly a year later, a minute order had been entered by the Chief Judge of the District of Delaware "closing out" the consolidated Delaware reverse FOIA action, (A. 46, 55), and concluded that although the case "was not dismissed in form, it was dismissed in fact and by acquiescence of the parties the matter was dropped." (A. 47). Based upon these factors, the court concluded that the actions in Delaware were "dead." *Id.*

The court did not, however, rely solely on the lack of any further action in Delaware as a basis for directing that the case be heard in the District of Columbia. It pointed to the absence of the requesting parties in Delaware (A. 48), and it remarked that the Commission had been "less than vigilant" in litigating in Delaware, concluding that the "pro-disclosure position was all but unrepresented" there. (A. 48). Based upon this and the fact that the entire controversy could properly be adjudicated in the District of Columbia where all parties were present, it directed the parties to proceed to the merits.

The decision in the District of Columbia produced a renewed flurry of activity in Delaware. (A. 59). A hearing was convened at which the court, after stating that the case was not dead, set discovery deadlines and established a trial schedule. Thereafter, the CPSC, more than two years after the reverse actions were filed, finally moved to transfer the twelve Delaware cases to the District of Columbia. Not surprisingly, the court rejected that plea as untimely, particularly in light of the representation that was made by the Commission in its earlier motions to transfer the five non-Delaware cases – which had been made after the D.C. case had been filed – that the Delaware forum would be an appropriate one. (Pet. App. A115). However, the Commission still did not move under Rule 19 to join the requesters in the Delaware action, despite the fact that the D.C. Circuit emphasized the absence of the requesters in the Delaware cases and that the Rule 19 issue has been fully briefed by the requesters in the D.C. Circuit.

Petitions for rehearing and rehearing *en banc* were filed by the manufacturers, and on August 25, 1977, the court denied them. (A. 58–61). In doing so, it recognized that the proceedings had not been formally concluded in Delaware, but it nonetheless determined that the action should proceed immediately to the merits in the District of Columbia where, in contrast to Delaware, all of the parties had been joined. Recognizing that the requesters were entitled to an expedited hearing on their claims under the FOIA, the court observed, as it turned out, very optimistically, "at long last, so be it." (A. 60).

4. Initial Proceedings in This Court.

The manufacturers then obtained a stay of the mandate in the D.C. Circuit, and on October 3, 1977, filed a petition for a writ of *certiorari* in this Court, No. 77-508. In their petition, they urged this Court to consider the issues relating both to the alleged absence of a case or controversy under Article III and the court of appeals' failure to defer to the district court in Delaware. After considerable delay, the CPSC filed its memorandum, opposing the grant of *certiorari* at that time, although indicating its view that the court of appeals was in error in failing to defer to the Delaware court. It did, however, make one concession: on "further reflection," it concluded that indeed there was a sufficient case or controversy for purposes of Article III and withdrew its prior position on that point. (CPSC Br. in 77-508 at 5).

On December 8, 1977, after the requesters had filed their opposition, the district court in Delaware made its preliminary injunction permanent. Petitioners then urged this as a further reason for granting the writ, or, in the alternative, for summary reversal of the decision below in order to allow the D.C. Circuit to re-consider its position in light of the entry of a final order in Delaware. On January 16, 1978, this Court granted *certiorari*, summarily vacated the decision below, and remanded it for further consideration in light of the entry of the permanent injunction in Delaware. (A. 62). 434 U.S. 1030 (1978).

5. Proceedings on Remand in the D.C. Circuit

On remand both the requesters and the submitters filed motions asking the court to establish a briefing schedule. Nothing further took place until September 20, 1978, when the court, *sua sponte*, issued an order providing for the submission of briefs within twenty days. (A. 11). Short extensions were obtained, and after all submissions were made, the court issued a new opinion on December 22, 1978, affirming its prior determination that the case should proceed to a decision on the merits in the District of Columbia.

After reviewing the history of the litigation, Judge Robinson's opinion reiterated the panel's prior conclusion that there was a case or controversy before the district court (A. 72), noting the CPSC's concession on this point in the Supreme Court. *Id.* at n. 33. The court then considered the various theories under which the district court might be barred from proceeding to the merits in light of the actions in Delaware. (A. 73). First, it considered the possibility of applying the doctrine of *stare decisis*, but found that its application was optional, and it declined to require

that the district court follow the rulings in Delaware without conducting its own independent examination. *Id.*

Next it considered whether collateral estoppel could bind the requesters in spite of the fact that they were not parties in Delaware. Initially, it recognized the constitutional due process problem in so ruling and observed that rarely, if ever, would non-parties be bound by a prior decision. (A. 74). It then observed that such preclusive effect would be particularly inappropriate here since the interests of the CPSC and the requesters "diverge markedly." (A. 75). The court pointed out a number of respects in which, although formally aligned with the requesters, the CPSC's interests were not congruent with those of requesters in general, or even the requesters in this particular case. *Id.* at nn. 40 and 42.

Finally, the court considered the issue of comity which had been most heavily relied on by petitioners. It recognized the general applicability of the doctrine, but it observed that it "surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent." (A. 77). For reasons previously noted, it declined to rule that the CPSC would adequately protect the interests of the requesters and found that the FOIA, including its liberal venue provisions, reinforced the right of the requesters to litigate the matter in a forum of their choosing. It suggested a number of procedural devices, including 28 U.S.C. §1404(a) and Rule 19, and noted the duty of the parties in Delaware to attempt to utilize them to accommodate the interests of judicial efficiency. (A. 78–82).[4] The court then addressed the issue of whether

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[4]The court also suggested the possibility that a defendant class of all requesters might be named to obtain preclusive effect for any

the requesters could be required to intervene in Delaware in lieu of commencing their own action in the District of Columbia. Relying on the FOIA and other authorities, the court ruled that mandatory intervention would be inappropriate (A. 84), and, based upon this and its prior rulings, concluded that the requesters could have their case adjudicated on the merits despite the permanent injunction in Delaware. (A. 86).

6. Further Proceedings in This Court.

Once again the manufacturers obtained a stay of the mandate, and on February 12, 1979, they filed their second petition for a writ of *certiorari* with respect to all of the issues initially presented, not simply those suggested by this Court's remand order. Once again the CPSC did not file a petition, concluding that review by this Court was not yet necessary in light of the fact that the appeal from the final decision of the district court in Delaware had not yet reached a decision in the Third Circuit. The government did agree, however, that the court below was in error in refusing to apply the doctrine of comity.

On the day that the brief of the requesters was to be filed, the Court of Appeals for the Third Circuit affirmed the grant of the permanent injunction issued by the Delaware court. *GTE Sylvania Inc. v. Consumer Product Safety Comm.*, 598 F.2d 790 (1979). On that appeal, the requesters, over the objection of the manufacturers and the CPSC, had filed an *amicus* brief urging the court of appeals to vacate the lower court decision because of the failure to

judgment in Delaware. Requesters believe that no such class proceeding would have been necessary in this case, and without conceding that preclusive effect could ever be obtained, do not urge the possible use of a defendant class to resolve the problem of the appropriate forum for this kind of litigation.

comply with Rule 19. The court of appeals determined not to accept the invitation to vacate, viewing the request as one which would require Rule 19 to be applied in all direct and reverse FOIA cases where there are known requesters or submitters. *Id.* at 798. However, the court did recognize the interest in judicial efficiency in consolidation, and it assumed that, because the requesters were parties coming within the terms of Rule 19(a)(2), failure to join them subjects the CPSC to "a substantial risk of incurring inconsistent obligations with respect to disclosure of the TV-related accident data." *Id.* Nevertheless, the court declined to apply Rule 19 in view of the fact that the interest of the manufacturers in preserving their judgment was strong, an interest further cemented by the fact that the court then proceeded to consider and affirm the merits of the decision below. In declining to vacate, the court observed that "it may have been appropriate for the district court to have dismissed the action or transferred it to the District of Columbia upon consideration of the Rule 19 issue prior to its entry of final judgment," but that subsequent events had shifted the balance to warrant a different result. *Id.* at 799.

The manufacturers then filed a supplemental memorandum in this Court which attached the opinion of the Third Circuit. Although that court did not specifically disagree with the merits of the D.C. Circuit's ruling, the affirmance of the permanent injunction increased the likelihood that there would be either inconsistent rulings or duplicative efforts in the D.C. Circuit. It was after this latter submission, without further memoranda from either the CPSC or the requesters, that this Court granted review on May 14, 1979.[5]

[5]The government has indicated that a petition for a writ of *certiorari* will be filed from the decision in the Third Circuit, which is in

SUMMARY OF ARGUMENT

Petitioners advance two distinct legal theories to justify their claimed right to select the forum for this litigation based solely on a race to the courthouse. Because neither precedent nor sound policy supports either theory, the court of appeals properly rejected them.

Petitioners' first argument – that there is no case or controversy under Article III – rests on decisions such as *Muskrat v. United States,* 219 U.S. 346 (1911), where the only parties to the action agreed on the result, and hence the lawsuit was little more than "a feigned controversy" or an "amicable action." *Lord v. Veazie,* 49 U.S. (8 How.) 250, 255 (1850). In this case, while the requesters and the CPSC agree that the documents should be released, they sharply disagree over the effect of the prior Delaware action. More importantly, the joinder of the submitters as defendants in this action brings before the court parties who disagree on whether the TV accident reports must be disclosed and thereby produces the "concrete adverseness which sharpens the presentation of issues on which the Court so largely depends for illumination of difficult . . . questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

Indeed, even in less compelling cases, where persons with adverse interests were not joined as parties, this Court has decided important legal issues, including constitutional questions, either with the aid of an *amicus, United States v. Lovett,* 328 U.S. 303 (1946), or by curing the difficulty

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direct conflict on the merits with the decision of the Second Circuit in *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Comm.,* 585 F.2d 1382 (1978). (CPSC Br. 38, n. 20). The time for filing that petition has been extended a second time until September 27, 1979.

through intervention, *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976). Petitioners' overly restrictive view of the requirements of Article III is also seriously undermined by their concession that there would be a case or controversy if the requesters had intervened in Delaware, even though the same parties would be litigating the same legal issues and the only change would be that the requesters and petitioners would have switched positions in the caption of the case.

To conclude that Article III requires dismissal would accomplish little in future cases since requesters could always insure a dispute with an agency by including in their request some documents for which denial seems likely, instead of compromising as requesters did here. The result urged by petitioners could also be avoided if the requesters filed their action before the agency reached its decision, but after the FOIA's relative short time limits for a response had expired. Such a course of action would produce unnecessary burdens on all concerned, with no clear benefit to anyone other than the requester who would be assured of the forum of his or her choosing.

The second argument made by petitioners, in which they are joined by the CPSC, is that the prior orders in Delaware should have precluded the court of appeals from directing the action to go forward on the merits in the District of Columbia. The fundamental flaw in this argument is that it equates this case with one in which a final judgment had been entered in Delaware, and affirmed on appeal, before the complaint had been filed in the second action. While admittedly the Delaware case has proceeded to judgment, that is entirely due to the decisions of petitioners and the CPSC to proceed in Delaware without attempting to join the requesters, while simultaneously resisting efforts to have this

controversy decided in the District of Columbia where all interested parties are present. Thus, in determining the proper forum for adjudicating the dispute, fairness requires that the focus be on the balance of equities as they stood when the complaint was filed in the District of Columbia, not as they presently appear. And in striking that balance, the scales should not be tipped in favor of the submitters by virtue of their having obtained temporary restraining orders before the instant case was filed, since petitioners and the CPSC concede that the entry of such orders were in this case, as in all reverse cases, virtually automatic.

In support of their argument that the D.C. action was properly dismissed, petitioners and the CPSC rely on the doctrine of comity and the fact that the reverse cases were filed first. Such reliance is misplaced primarily because comity applies only when the parties are identical, *Great Northern Ry. Co. v. National RR. Adjustment Bd.*, 422 F.2d 1187, 1193 (7th Cir. 1970), and the requesters were never joined or attempted to be joined in Delaware, whereas all parties are present in the District of Columbia. Because due process precludes giving a judgment binding effect on persons who are not parties to an action, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), there was no reason to apply comity here because the result in Delaware cannot preclude the requesters from litigating their claim in the District of Columbia.

The reliance of petitioners and the CPSC on cases recognizing an exception to the general rule in which non-parties have been bound is also misplaced because, as this Court has recently demonstrated, that exception is extremely narrow. *State of Montana v. United States*, 99 S. Ct. 970 (1979). Whatever the scope of that exception may be, it would be improper to apply it here where its principal justification – adequate representation in the earlier action – is lacking. Because the CPSC is primarily a stakeholder in this case, and because it, like all federal agencies, has interests in FOIA litigation which "diverge markedly" (A. 75) from those of requesting parties, it is doubtful if its representation could ever be sufficient to bind non-consenting requesters who are not parties to a reverse FOIA case. Indeed, in this litigation, the CPSC both took and failed to take a number of actions which, while they may have been appropriate from its own perspective, surely were detrimental to the interests of the requesters.

To allow comity to bar this case from proceeding to the merits gives the submitters an absolute choice of forum, since only they will know whether they will acquiesce in an agency's decision to release documents, and hence they can always win the race to the courthouse. There is no indication that Congress ever intended to confer such an important advantage on persons who are not even made beneficiaries of the FOIA. *Chrysler Corp. v. Brown*, 99 S. Ct. 1705 (1979). Submitters may be entitled to "an equal start in the race to the courthouse, [but] not a headstart." *Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co.*, 342 U.S. 180, 185 (1952).

Petitioners' suggestion that a race to the courthouse alone should resolve the forum dispute is an overly rigid approach which should be rejected because it will produce unfairness to litigants (both requesters and submitters), will unnecessarily interfere with the administrative process, and unduly burden the federal courts. If a race to the courthouse is to be the method of deciding the proper forum, requesters in future cases will win most races since they will have the advantage of the strict time limits of the FOIA which agencies rarely meet. Thus, except in this instance where the request-

ters allowed the administrative process to run its course in an effort to avoid litigation, it will be the requesters who will file first to protect their choice of forum. But regardless of who wins the race, it is not sound policy to decide issues of the appropriate forum for litigating controversies such as this solely by a race to the courthouse where one side or the other, under the rules of the race, cannot win. Moreover, making forum decisions turn on the winner of such a race unnecessarily interrupts the administrative decision-making process and prematurely burdens the federal courts.

Rather than a rigid first to file rule, the federal courts should deal with each case individually, utilizing the remedies available under Rule 19 and 28 U.S.C. § 1404(a) to attempt to consolidate all of the litigation in a single appropriate forum. While this solution may not solve all problems in all cases, its flexibility offers the best chance of resolving the question in an equitable, rather than arbitrary manner, taking into account the interests of the litigants and the courts.

ARGUMENT

I. THERE EXISTS SUFFICIENT ADVERSENESS TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III.

Pursuant to the Freedom of Information Act, the requesters have sought access to television-related accident reports submitted by petitioners to the CPSC. The CPSC has processed the request and has to this date declined to make the documents available. Section 552(a)(4)(B) of Title V

provides that the district courts shall have jurisdiction to enjoin an agency such as the CPSC from withholding records from any person who has requested and been denied access to them. Since the requesters have sought and been denied access to the documents at issue here, they have a valid claim under the Act. Despite this fact, petitioners contend that the issue of the requesters' entitlement to the documents cannot be litigated because the case or controversy requirement of Article III of the Constitution prohibits it.

Petitioners' constitutional theory is based on the fact that the CPSC has examined the documents and concluded that they are not subject to withholding under any of the permissive exemptions to the FOIA, and that, moreover, even if they were exempt from mandatory disclosure, the CPSC would release them since they contain matters of public interest. (A. 23-24). According to petitioners, because the CPSC agrees with the requesters on the scope of the FOIA's exemptions, Article III precludes a court from deciding whether the documents must be turned over in the face of the Delaware injunction precluding disclosure. The CPSC concedes that there is Article III jurisdiction because of a live dispute as to the legal effect of the temporary restraining order, preliminary injunction, and now permanent injunction entered in Delaware, a dispute in which the government sides with petitioners against the requesters. (CPSC Br. 21, n. 10). Thus, despite this continuing disagreement as to the effect of the Delaware orders, the manufacturers contend that there is no case or controversy in the District of Columbia, even with the joinder of petitioners who oppose the requesters on virtually every issue in the case.

In discussing the meaning of the terms "case or controversy" in Article III, this Court has described them as "limit[ing] the business of federal courts to questions presented in an

adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The requirement of adverseness, as the petitioners themselves note (Br. 22), "assures sound adjudication based on a full presentation of facts and arguments, for it is the 'concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult . . . questions.' *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)." Or, as this Court observed in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937), a case dealing with the constitutionality of the Declaratory Judgment Act, Article III can be invoked only when there is "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothethical state of facts."

Requesters respectfully submit that there is sufficient adverseness in this proceeding to give the courts the requisite illumination on all of the procedural and substantive issues on which they must pass judgment. Surely, this is neither "a feigned controversy" nor an "amicable action," *Lord v. Veazie*, 49 U.S. (8 How.) 250, 255 (1850). Nor is this a collusive lawsuit in which there are no truly adverse parties, such as *Muskrat v. United States*, 219 U.S. 346 (1911), on which petitioners rely. While it is true that the requesters and the CPSC agree that none of the FOIA exemptions applies, this case differs from every one of those relied on by petitioners because in none of those actions was a third party joined who had the adverseness required to assure the presentation of both sides of the controversy to the court.

The importance of the presence of third parties is clearly demonstrated by the two parallel cases before this Court in-

volving the Charlotte-Mecklenberg School System. On the same day that this Court dismissed *Moore v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 47 (1971), for lack of a sufficient case or controversy, it decided the same issues in *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), because in the latter case there were parties representing both sides of the controversy rather than only those who sought an identical resolution of it. Even more to the point is *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), where, although the case between the original parties had become moot, the intervention of the United States enabled this Court to proceed to decide the merits. *Id.* at 430-431. Since all of the parties to the instant controversy do not desire the same result, none of the authorities relied on by petitioners is relevant to this case, and there is sufficient adverseness to satisfy the purposes of the constitutional minimum contained in Article III.[6]

This Court has never taken the narrow, hyper-technical view urged by petitioners in deciding whether to adjudi-

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[6] *United States v. Johnson*, 319 U.S. 302 (1943), another authority relied on by petitioners, is a further illustration of a collusive suit seeking a federal court adjudication on the constitutionality of a congressional statute on grounds of excessive delegation of the legislative power. The United States intervened at the district court level to defend what was obviously a sham lawsuit, since the party nominally opposing the declaration of unconstitutionality was a straw for the other side. This Court ruled that the initial suit should have been dismissed because it lacked the requisite adverseness. It did not address the question of whether the case could have proceeded had the United States been properly joined as a party in an action seeking a declaration that the statute was unconstitutional. Indeed, such an action plainly would have been proper with or without the "straw." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D. D.C. 1971) (three-judge court).

cate a live dispute. Perhaps the most striking demonstration of this is *United States v. Lovett*, 328 U.S. 303 (1946). There, three individuals challenged a federal statute on the ground that it constituted a bill of attainder, since it denied them compensation for work done for the government because of certain of their activities of which Congress disapproved. In the lawsuit brought in the Court of Claims to recover their back pay, the individuals and the Department of Justice agreed that the law was unconstitutional and that their claims should be paid. Nonetheless, both the Court of Claims and this Court adjudicated the merits of the controversy, after allowing Congress to file a brief in support of the constitutionality of the law. Despite the fact that all the named parties were in total agreement on the merits, no one argued that this Court lacked jurisdiction under Article III. We respectfully submit that if this Court had the power to decide the constitutional issues in *Lovett*, the federal courts have the power to decide the requesters' statutory entitlement to access to these documents under the Freedom of Information Act.[7]

Not only is the position of the petitioners unsupported by authority, but it would produce results at variance with the common understanding of the operation of the federal

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[7] In two deportation cases, where the issue before this Court was jurisdictional, and the alien and the government agreed on its outcome, but the courts of appeals had found to the contrary, this Court proceeded to decide the question in each case with the aid of an *amicus*, in one case appointed by this Court for that purpose, *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206, 210 n.9 (1968), and in the other where the *amicus* appeared on its own, *Foti v. Immigration & Naturalization Service*, 375 U.S. 217 (1963). *See also Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (claimants and government agreed on merits of unconstitutionality of legislative veto and court, with the assistance of Congressional *amici*, decided the issue).

courts and would unduly burden litigants and judges. The issue, according to petitioners, is the power of the court to decide these questions under Article III, a power which cannot be conferred on the courts by consent. If their position is valid, it is difficult to understand the basis upon which the Securities and Exchange Commission or the Antitrust Division of the Justice Department can ever obtain a consent decree, especially when that decree is filed with the complaint. Indeed, once there is agreement at any time during a lawsuit, if the petitioners' theory is accepted, there is no longer any case or controversy, and the federal courts would lose the power to enter an order making the agreement into a binding order. In a Freedom of Information Act case, therefore, it would be "unconstitutional" for a court to enter an order, with the consent of the government, directing it to release the documents at issue. In short, the court would have the power only to enter litigated, but not consented to, judgments.

Similarly, the court would not have the power to reverse an order where, on appeal, one of the parties confessed error, because if there was agreement, there would be no jurisdiction. This notion is directly refuted by this Court's actions in *Sibron v. New York*, 392 U.S. 40 (1968), in which the District Attorney confessed error in this Court, and the Court nonetheless declined to accept it, and proceeded to make a judgment on its own as to whether error had taken place. Surely, if petitioners were correct, this Court would have had no jurisdiction to make any independent examination on its own before agreeing that the search at issue was invalid. Even less constitutionally permissible would have been the actions of the Chief Justice, Justice White, and Justice Rehnquist dissenting from a confession of error in *Rosengart v. Laird*, 405 U.S. 908 (1972), yet no one has ever questioned the permissibility of such practices under Article III.

Petitioners' strained interpretation of Article III would also void the Federal Interpleader Act, 28 U.S.C. § 1335, in a number of instances. That statute permits an action to be brought by a stakeholder "even though he believes only one [claim] is meritorious." *Hunter v. Federal Life Ins. Co.*, 111 F.2d 551, 556 (8th Cir. 1940). Typically, in an interpleader action, the plaintiff agrees that one person is entitled to a sum that is held, but the limitation on Article III suggested by petitioners would virtually eliminate the utility of interpleader except perhaps as a defensive measure. Once again, it is difficult to comprehend what purpose served by Article III would be advanced by the narrow construction of the case or controversy requirement which petitioners have urged.

Although in this case the requesters and the CPSC have agreed that all of the documents covered by the complaint should be disclosed, the much more typical FOIA case involves a set of documents, some of which the agency agrees to release, while others remain in dispute. In such a situation, it is unclear what, under the petitioners' view, Article III would permit in a suit in which the agency, the requester, and the submitter were parties. Could a federal court decide all of the questions presented even though there is agreement between the requester and the agency as to some documents, or would it have to rule on only those over which the requester and the agency disagreed, leaving the remaining issues to be litigated in a reverse FOIA case? In the latter situation, presumably the court in the reverse case, for similar Article III reasons, could not decide the disclosability of any documents as to which the submitters and the agency were in agreement, thus assuring two separate actions, considering different portions of the same documents.

On the other hand, if the requesters could obtain a court order with respect to all of the documents so long as a portion of one of them was in dispute, the position urged by petitioners here would be largely meaningless because in almost every case there is the potential for *some* dispute. In fact, in this instance there would have been a dispute, but for the willingness of the requesters to narrow their request to eliminate certain materials. (A. 17). Surely, in the future no well-informed requester will agree to any such compromise if the effect is to deny that person the right to litigate the disputed claim in a forum of his or her choosing.

The heart of petitioners' argument is that here the CPSC actually determined that the requested documents should be released and agreed to do so. Therefore, presumably no such Article III bar would have existed when the CPSC was still considering whether to release the documents. If that is the case, the requesters could have brought suit at any time after the initial denial, and also could have filed after the agreed-upon mid-March deadline had passed before a CPSC decision had been announced. Yet by agreeing to allow the administrative process to run its course, petitioners contend that because of Article III, the requesters have forfeited their right to bring their own lawsuit in a federal court. If that is so, the manufacturers' position can only encourage further litigation and future refusals by requesters to allow the administrative process to be completed.

Finally, petitioners have never satisfactorily explained the inconsistency between their Article III position here and their repeated urgings that requesters intervene in Delaware and have their claims decided there. Presumably, such intervention would have to be as a defendant, since otherwise the same lack of case or controversy would preclude

the requesters from being a plaintiff in Delaware against the CPSC, just as it would prevent them from being a plaintiff against the CPSC in the District of Columbia. As a defendant, however, they would wish to raise a cross-claim against the CPSC to insure the actual release of the documents once that litigation was concluded. Again, the question arises as to whether Article III would permit that kind of cross-claim under petitioners' theory.

But assuming that all of these difficulties can be surmounted, and that somehow the requesting parties could have their claims adjudicated in Delaware, it is difficult to comprehend how Article III of the United States Constitution can be satisfied in Delaware where three sets of parties are litigating certain issues, and yet the same provision of the Constitution precludes a federal court from adjudicating the same controversy involving the same sets of parties and the same issues in the District of Columbia, simply because the requesters and the submitters have reversed their designations as plaintiffs and defendants. In the context of the Declaratory Judgment Act, this Court has rejected any such formalistic approach, observing that "the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937). *See also Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (finding that it is "immaterial" that the normal positions of the parties are reversed.) No purpose underlying Article III would be served by applying it to prevent the action brought in the District of Columbia from going forward, but not applying it to preclude adjudication of the same controversy in Delaware.

As this Court noted in discussing another aspect of the meaning of case or controversy, a federal court "cannot be

umpire to debates concerning harmless, empty shadows," but that in determining whether it should proceed, it must not "close [its] eyes to reality." *Poe v. Ullman*, 367 U.S. 497, 508 (1961). Mr. Justice Frankfurter, writing for the plurality, then noted that

> [j]usticiability is, of course, not a legal concept with a fixed content, or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought. *Id.* at 508-09.

Petitioners are simply asking this Court to close its eyes to reality and to preclude the requesting parties from having their day in the court of their choosing because of assumed limitations imposed by Article III. Neither their authorities nor sound policy dictates any such effect for Article III's requirement of a live case or controversy, and the court of appeals properly held that Article III did not prevent this case from going forward.

II. THE FILING OF A COMPLAINT IN DELAWARE DID NOT PRECLUDE THE ADJUDICATION OF THIS CASE IN THE DISTRICT OF COLUMBIA.

A. In Determining Whether This Case Is Precluded by the Delaware Action, the Court's Focus Should Be On The Cases As They Stood When This Action Was Filed, Disregarding The Issuance Of The Automatic Restraining Orders in Delaware.

In the present posture of this case, there is a permanent injunction in Delaware which has been affirmed by the Third Circuit, and no litigation has yet taken place on the merits in the District of Columbia. Under these circumstances, according to petitioners (Br. 32-33), this case should not proceed because to do so would be to litigate in the face of a "final decree" entered in another court of equal jurisdiction. Of course, the principal reason that there has been no litigation on the merits in the District of Columbia is that the manufacturers and the CPSC have used all of their skill and legal resources, virtually from the moment that this case was filed, to prevent any adjudication in the District of Columbia and instead to obtain a decision from the Delaware court.

In our view, the effect to be given the Delaware actions should turn on their status as of the date that the instant action was filed, and not as of the present time. Fundamental notions of fairness ought to preclude petitioners and the CPSC from relying upon the *fait accompli* of having obtained a permanent injunction, for which they are responsible and over which the requesters had no control, to shift the focus to the present situation. Indeed, in a number of cases, this Court has not allowed the advanced stage of litigation to influence its outcome where there are fundamental errors regarding important rights. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434 (1977) (injunction against unconstitutional state statute set aside for failure to abstain due to pending state case); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (declaration of unconstitutionality of federal statute overturned for lack of standing); *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961) (judgment of escheat set aside because state court had no power to protect stakeholder from claims of other states).

The efforts of petitioners and the CPSC to have this Court focus on the current status of the Delaware action follows naturally from their earlier efforts in the trial court to rely on the issuance of temporary restraining orders to buttress their claims that the District of Columbia action should be stayed. Both parties have renewed that reliance in this Court, citing the existence of outstanding court orders in Delaware as the basis for a separate legal argument, *i.e.*, that requesters have no cause of action under the FOIA. It is their contention that the FOIA only permits a court "to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B), and that records withheld pursuant to a court order are not "improperly withheld" within the meaning of the Act. (Pet. Br. 30-38; CPSC Br. 15-18). Apart from the fact that the courts have not read the jurisdictional grant of section 552(a)(4)(B) in so narrow a manner,[8] the argument is inapposite at least

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[8] The jurisdictional provision has been interpreted as providing review for a violation of any command of the Freedom of Information Act. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969). *See, e.g., Diapulse Corp. v. Food and Drug Admin.*, 500 F.2d 75 (2d Cir. 1974) (violation of search fee provision of section 552 (a)(4)(A)). Moreover, in *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974), this Court observed that the district court is "the enforcement arm of the statute" and that "there is little to suggest, despite the Act's pri-

in this instance because of the nature of the orders relied on.

This is not a situation where there was a final judgment in a case concluded long before the instant action was filed, such as those cited by the manufacturers on pages 32-33 of their brief. The orders relied on as the linchpin for their argument are the temporary restraining orders issued in the twelve reverse cases almost immediately after they were brought. However, the manufacturers concede, indeed they strongly argue, and the CPSC does not disagree, that both the government and the district courts had no choice in granting such orders: "The need for TROs to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware District Court was certain, and therefore opposition plainly would have been fruitless." (Pet. Br. 29, n.17). Whatever the impact of the "improperly withheld" language might be in a case which was fully litigated to a final judgment before the requesters filed their own suit in another jurisdiction, the circumstances of this case are very different.

All that had happened in Delaware when this case was filed was the issuance of a temporary restraining order, without any opposition or serious likelihood of denial. In fact, since obtaining a temporary restraining order is virtually automatic in these situations, the position of petitioners and the government transforms the filing of the complaint into the decisive factor in the "improperly withheld" argument. But that argument is little more

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mary purpose, that Congress sought to limit the inherent powers of an equity court." *Id.* at 20. Presumably included in these equity powers is the authority to direct the parties to stay identical litigation pending in another court. *See Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971).

than another way of stating petitioners' view that their victory in the race to the courthouse provides them with the sole right to determine the forum in which these cases shall be litigated. Therefore, at least in the context of this case, the "improperly withheld" argument is not a separate legal theory, and accordingly it will not be discussed further by requesters.

Another reason why this Court should view this case as it stood when it was filed is that unless that is the focus, its value as guidance for requesters, submitters, government agencies, and the lower courts in future comparable situations will be minimal. Thus, this case merits review by this Court not only because of the possibility of conflicting orders in the present situation, but because similar situations are likely to arise in the future, and only a definitive ruling of this Court can prevent a repetition of the procedural litigation that has taken place here.[9] In fact, if this Court should grant the CPSC's petition for a writ of *certiorari* from the Third Circuit's decision, and decide the issue presented there, it will do so before this case can ever be litigated in the District of Columbia no matter what happens in this case in this Court. Regardless of whether the requesters would be legally bound by a decision affirming the Third Circuit (see pp. 34-41, *infra*), *stare decisis* would surely place a nearly insurmountable barrier in their path. The requesters might also have been equally foreclosed, as a practical matter, if the submitters in *Pierce & Stevens Chemical Corp. v. Consumer Product*

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[9] The same legal issue might also arise if the court in the second case entered an order restraining the parties from litigating the first case in which only some of the interested parties were joined. In both situations, the issue is identical: must the second court automatically defer to the first?

Safety Comm., 585 F.2d 1382 (2d Cir. 1978), the case which is in conflict with the decision of the Third Circuit, had obtained review by this Court and won a reversal.[10]

Therefore, the appropriate question for this Court is whether the filing of the reverse FOIA complaints in Delaware and three other jurisdictions automatically requires the District of Columbia court to hold all proceedings in abeyance until the earlier cases are finally decided in this Court? The effect of an affirmative answer would be to require the requesters to go to Delaware or to lose their right to participate in the litigation. Stated another way, the question becomes, does the race to the courthouse decide in which forum the contest between submitters and requesters will be litigated, even though the requesters have no idea which submitters will contest the CPSC's ruling until after a reverse case is filed?

B. The Doctrine of Comity Relied on By Petitioners and the CPSC Is Inapplicable.

1. Because the Requesters Are Not Parties in Delaware, Due Process Precludes the Requesters From Being Bound By A Judgment There.

The legal basis for the argument of petitioners and the government that the Delaware cases should be litigated and the District of Columbia case be stayed is the doctrine of

[10] Of course, if this Court were to reverse the Third Circuit's decision on the merits, that would not end the proceedings in Delaware, since the manufacturers raised a number of alternative claims for withholding which were not decided below. *See* Pet. App. A88-89. However, this Court's ruling in this case would, as a practical matter, determine whether on remand to the Delaware court, any further proceedings should be transferred to the District of Columbia.

"comity." Founded on notions of sound judicial administration, it "requires that when two identical actions are filed in courts of concurrent jurisdiction, the one which first acquired jurisdiction should be the one to try the lawsuit. The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results." *Great Northern Ry. Co. v. National Railroad Adjust. Bd.*, 422 F.2d 1187, 1193 (7th Cir. 1970). The rule of comity is not an ironclad one, and upon a showing that the "balance of convenience [is] in favor of the second action" or that there are other "sound reasons" for not proceeding in the first case, the general principle will not be followed. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202, 1203 (2d Cir. 1970); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971) (first case proceeds in the "absence of compelling circumstances," but even then the first court is obligated to make an examination to be certain that the rule is properly applied).

More importantly, the doctrine applies only when the parties are the same in both actions, *Great Northern Ry., supra,* and since the requesters were not named or attempted to be joined in Delaware, the doctrine is inapplicable here. The principal reason that comity cannot be applied where there is no identity of parties is that considerations of due process preclude binding a person to a judgment in an action in which he or she is not joined:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications

of the identical issue which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971). Due process objections have required that this Court set aside a determination to escheat funds by the Pennsylvania Supreme Court where the State of New York was not joined as a party. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.") Moreover, as this Court recently noted in *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 649 n.7 (1979): "It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." Since the doctrine of comity is intended to be used to avoid duplicative litigation, it has no function where, for due process reasons, the second action must go forward in any event.

2. The Exceptions To The Requirement That The Parties To Both Actions Be Identical Do Not Apply.

Both petitioners and the government cite cases which they contend constitute an exception to the due process requirement that a party must be before the court to be bound. *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); and *Gregory-Portland Independent School Dist. v. Texas Education Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1423 (1979). First,

it must be noted that none of those cases involves the application of the doctrine of comity in order to decide, at the outset, which of two nearly simultaneously filed cases should go forward; they are all cases where there has been a final judgment entered, and the issue is whether that prior judgment is binding against non-parties.

Second, whatever the merits of those cases may be, they must be evaluated in light of this Court's recent decision in the *State of Montana v. United States*, 99 S.Ct. 970 (1979), in which the Court concluded that the United States, while not technically a party to an earlier proceeding, would be bound because of an intimate connection with, and indeed actual control over, the litigation. The case is particularly noteworthy for the extraordinary lengths to which the Court went before finding that the United States was bound by the prior action which the government had directed and financed in the name of a private party who had contracted with it. *Id.* at 972. Thus, after noting that there were seven specific facts demonstrating that the United States controlled the prior action from its inception to a withdrawn appeal in this Court, the Court concluded that the government might be bound despite not having been a formal party where it had a direct financial or proprietary interest in the prior litigation. *Id.* at 974-75. Even then, this Court suggested that there may be "other special circumstances" that would justify an exception even where there has been prior control. *Id.* at 975. It is therefore apparent, based on *State of Montana*, that any exception to the rule on binding non-parties is a very narrow one which should be applied only with the greatest caution.

Whatever the scope of that exception may be, there are at least two compelling reasons why it should not be ap-

plied here. Whenever a court has bound a non-party, it has concluded that there was adequate representation by existing parties, including generally a finding that there was a unity of interest between them or actual or substantial control by the non-party over an actual party to the earlier litigation. Petitioners and the CPSC argue that this test is met here because the government is adequately representing the requesters in Delaware despite the fact that "in most reverse cases, the government can be accurately characterized as a mere 'stakeholder,' . . ." G. English, *Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits,* 1 Admin. L. Rev. 151 (1979). Without attempting to second-guess the strategy of the government here, but solely to demonstrate the divergence of interests between the requesters and the government, it is useful to review the government's conduct to determine whether the representation was sufficient to satisfy due process.

At the outset, the government consented to a number of temporary restraining orders and then, contrary to the specific dictates of Rule 65(b), first permitted the two ten-day restraining orders to be extended for more than two and a half months, until the hearing on the preliminary injunction on July 23, and then continued them until the Delaware court ruled on the preliminary injunction, which was not until late October. Thereafter, while the government may well have correctly perceived that an appeal of the preliminary injunction would not succeed, it nonetheless did nothing to convert the preliminary order into a final one for nearly two years, it allowed the case to be closed for "statistical purposes" (A. 45), and then it sought to reopen the case and obtain a final appealable order only after the Court of Appeals for the D.C. Circuit handed down its first decision in the instant action,

directing the District of Columbia case to proceed on the merits.

In addition, the CPSC wholly failed to take any action to attempt to bring all of the parties into a single forum either in Delaware or the District of Columbia. It neglected the opportunity for joinder under Rule 19, even after the issue was fully briefed and relied upon by the D.C. Circuit. It moved to transfer the Delaware action to the District of Columbia only after the D.C. Circuit's first decision was handed down, although two years before it had moved to transfer five other actions to the District of Delaware from other districts where they had been filed. Not surprisingly, its tardy transfer motion was denied by the district judge in Delaware as untimely, particularly in light of the CPSC's prior representation that transfers to Delaware were to an appropriate forum, even after this case had been filed in the District of Columbia. (Pet. App. A115). And when the requesters attempted to raise Rule 19 on appeal to the Third Circuit, not only did the government disagree with the position taken, but it urged the court to reject the *amicus* brief that requesters sought to file on that issue. Moreover, the CPSC steadfastly opposed the requesters' efforts to have this litigation concluded in the District of Columbia when it was plainly in their interest to do so.

The point of all of this is not, of course, to question whether the litigation strategy of the government was adequate from the point of view of its interest; this history simply demonstrates that the government's interest and that of the requesters are very different.[11]

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[11] Besides differing on questions of strategy, and despite their ultimate agreement of the issue of disclosability, the CPSC failed to raise the principal issue briefed by the *amicus* Consumer Federa-

Given this history, it is difficult to contend that the representation of the requesters by the CPSC in Delaware was sufficient to satisfy the requirements of due process. Indeed, even the government concedes that in some cases its representation of requesters may be inadequate (Br. 37), although it argues vigorously that it was satisfactory here. Its position seems to be that the question should be examined separately in each instance, yet such a case-by-case analysis would inevitably lead to extraordinary amounts of litigation and attempts to second-guess strategies. Would it, for example, be incumbent on the government to appeal, even to this Court, every adverse decision in order to establish the requisite adequate representation? Or would the presumption be that the representation was always inadequate because of the government's role as a mere stakeholder?

We respectfully suggest that in the context of the Freedom of Information Act, those questions simply ought not to be asked, since they will produce both unnecessary litigation and answers which do not solve the fundamental problem of selecting the appropriate forum. Indeed, even in areas in which the governmental interest and the private interest are not nearly so adverse as they are here, such as the antitrust field, this Court has not bound private parties to the results obtained by the government: "Of course, a consent judgment, even one entered on behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of non-parties." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 99

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tion of America in the Third Circuit, *i.e.*, whether the statute relied upon by the petitioners, 15 U.S.C. § 2055(b)(1), is a statute that falls within Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3).

S.Ct. 1551, 1559 (1979). It would, we submit, be more than a little ironic to assume that, although Congress enacted the Freedom of Information Act in order to prevent agencies from withholding records from the public, (see Pet. Br. at 34; CPSC Br. at 17), yet when there is litigation over disclosure, the agencies can adequately represent requesters in reverse FOIA actions brought by submitters.[12]

C. Sound Reasons of Policy Support the Conclusion of the Court of Appeals To Decline To Resolve the Question of the Appropriate Forum for this Litigation by a Race to the Courthouse Alone.

One reason for declining to apply comity in this case is that it gives an overwhelming advantage to the submitters in selecting a forum for the litigation.[13] Forum shopping is generally undertaken either to obtain the anticipated benefits of a court that is expected to rule favorably to the litigant, or to have the case tried in a place that is

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12 Petitioners (Br. 53), but not the CPSC (Br. 27, n.13), rely on dictum in this Court's opinion in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968), suggesting that a non-party might be bound because "he had purposely bypassed an adequate opportunity to intervene" as another reason for reversing the decision below. Given the breadth of the opportunity to intervene today in federal courts under Rule 24, that statement in *Provident* cannot be read as broadly as petitioners urge. Moreover, since requesters filed their own action joining all parties four days after the May 1st deadline, their conduct cannot fairly be described as having "purposely bypassed" an opportunity to litigate, unless one assumes the conclusion that the requesters had no choice but to intervene in Delaware.

13 *But see* pp. 44-45, *infra*, regarding the likely consequences of such a ruling in future "race" situations.

nearer to witnesses and counsel, thereby reducing both cost and inconvenience. While it is true that in this case the disadvantages to the requesters based on the location of the proceeding in Delaware are not very severe, other cases have already forced requesters from California to intervene in Virginia in order to protect their rights. *See Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). In other cases, requesters may simply have abandoned any effort to protect their interests because of the inconvenience and expense involved. Since choice of forum can be an important ingredient in litigation, particularly if the only opponent in the action views its role as a "stakeholder," the courts should not use the mechanical first-to-file rule embodied in the doctrine of comity unless it is a neutral principle. However, a brief review of the history of this litigation demonstrates that a race to the courthouse produces a result that is fixed in favor of the submitters.

Until March 28, 1975, the day that the CPSC announced its decision, there was no dispute between the requesters and the CPSC because there had been no decision on whether to disclose. Of course, the requesters could have viewed the prolonged delays, including the failure to meet the mid-March deadline, as a denial of their request, but they chose to allow the administrative process to work its course. Thus, until there was a decision, there was no certain dispute between the requesters and the CPSC, nor for that matter between the submitters and the CPSC. Under the race-to-the-courthouse theory of resolving forum shopping disputes, at the moment that the CPSC decided to release the documents, "the race was on." But at that point the only contestants in the race were the submitters since they were

the only ones who knew whether or not they would object.[14] Because the requesters had no known dispute with any manufacturer, there surely would have been no case or controversy between the requesters and the CPSC at that time. In other words, this race, if it is dispositive, was fixed: only the manufacturers knew whether there was going to be a dispute and therefore only they could win. Whatever application the notion of a race to the courthouse may have in resolving disputes about which federal forum should hear a particular litigation, no case has ever allowed the winner of the race to prevail when the loser is running with an absolutely insurmountable handicap.

In a similar situation this Court has rejected an attempt by the holder of a patent to stretch the Declaratory Judgment Act "to give him a paramount right to choose the forum for trying out questions of infringement and validity." *Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co.*, 342 U.S. 180, 185 (1952). As Mr. Justice Frankfurter observed, the holder is "given an equal start in the race to the courthouse, not a headstart." *Id.* There is nothing in the FOIA or any of the statutes relied upon by petitioners to indicate they should receive a headstart. *See Chrysler Corp. v. Brown*, 99 S.Ct. 1705 (1979) (FOIA gives no rights to submitters). On the other hand, at least one court has suggested that requesters of information under the FOIA should be given "whatever advantages are conferred on [them] by statute." *Schwartz v. Internal Revenue Service*, 511 F.2d 1303, 1307 (D.C. Cir. 1975). Therefore, given the lack of neutrality in the first to file rule, and the absence of any indication that Congress intended to prefer submitters over requesters in forum shopping disputes, the

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[14] In fact, three submitters never did object (A. 37, n.6), and one manufacturer who filed suit subsequently withdrew it and permitted its documents to become public. (Pet. App. A109, n.1).

issue should not be resolved by a race to the courthouse alone.

Not only is there no authority that supports this unwarranted extension of the doctrine of comity, its application in these circumstances would raise serious questions of fairness and due process and will do nothing to solve the problem of judicial administration which, as the government recognizes, exists from the possiblity of concurrent litigation in reverse and direct FOIA cases. (CPSC Br. 11, 32-33). If the petitioners prevail here, the message to requesters will be clear: it is necessary to win the race to the courthouse to have an opportunity to litigate in the forum of your choice. Moreover, it will be clear that requesters cannot win the race once the agency has decided to release the documents, either because there would be no case or controversy, or because they would have filed too late. Requesters could win, however, if they sued early enough, and under the FOIA that would generally mean ten days after the request was filed unless the documents were actually made available.[15] The suit could then be brought immediately by the requesters yet, according to the CPSC (Br. 37), the submitters could not have sued first since they would not be certain that there would be a case or controversy or that any dispute would then be ripe. At worst, from the requesters' point of view, their action would be held in abeyance until the agency could conclude its administrative process, *see Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), but their choice of forum would be preserved.

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15 *But see* 5 U.S.C. § 552(a)(b)(B) (additional delays allowed for "unusual circumstances").

Such a result would assure the requesters their choice of forum at very little cost to them since the filing of an FOIA complaint is an easy and inexpensive act to undertake for any reasonably sophisticated requester of information. Since the requesters will not know which submitters will object, there will be no point in naming all of them under Rule 19. Instead, any interested persons would have to intervene themselves, thereby making additional work for both the parties and the court. All of these procedures would create an unnecessary burden on agencies, submitters, requesters, and federal judges. Thus, the end result would be that, if winning the race means a choice of forum, a submitter can never win a race to the courthouse against a knowledgeable requester. The sole exception is the case now before this Court, in which the requesters did not accurately predict what would happen as a result of their willingness to allow the administrative process to proceed to its proper conclusion.

The government recognizes the existence of the forum-shopping problem, and suggests that the first-to-file rule is a simple one and should be adopted for that reason. (Br. 33-35). It acknowledges that the rule would provide an advantage to requesters in some races and submitters in others, and thereby views the rule as essentially a neutral one. Requesters agree with the CPSC (Br. 33) that the objective of any system designed to deal with this problem "should be to minimize the burdens on the judicial system as a whole and to accommodate the systemic interests of litigants without regard to their identity or status," but disagree that their "race to the courthouse" test will achieve this goal.

Despite the surface appeal of the race to the courthouse solution, requesters believe that the inflexibility of relying

on such races is the heart of the problem. In our view, rather than a rigid rule, the courts need the discretion to achieve results that are fair to the parties and that advance their own independent interests in judicial economy. This Court has recognized this need with respect to the Declaratory Judgment Act which created similar kinds of problems: "Wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid, mechanical solution of such problems." *Kerotest Mfg. Co., supra,* 342 U.S. at 183. By opting for flexibility rather than rigidity, equitable factors can be considered in an attempt to balance the competing interests of the parties concerned. *Cf. Penn General Casualty Co. v. Pennsylvania ex rel Schnader,* 294 U.S. 189, 197 (1935). Courts in these cases are acting as courts of equity, and, as this Court observed in *Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944), the

> "essence of equity jurisdiction has been the power of the Chancellor to do equity and mold each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between the public interest and the private needs, as well as between competing private claims."[16]

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[16] The Third Circuit recently declined to decide a forum shopping dispute based on the winner of the race to the courthouse, relying instead on the "interest of justice" standard in 28 U.S.C. § 2112(a) to resolve the matter. *United Steelworkers of America v. Marshall,* 592 F.2d 693 (1979). In so ruling, it noted that "[u]nlike race tracks, however, courts are not equipped with photoelectric timers . . . ." *Id.* at 695.

This Court has recognized in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976), that in determining which federal district court should hear a case, "no precise rule has evolved [but] the general principle is to avoid duplicative litigation." Although that case involved conflicts between federal and state jurisdictions, the approach adopted there is, we submit, appropriate for this situation. It includes weighing such factors as convenience, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained. *Id.* at 818. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19. Of particular relevance to this case is that, although the federal action was first filed in *Colorado River,* jurisdiction went to the state court because, as this Court noted, only the filing of the complaint had taken place in federal court, *id.* at 820, precisely the same act on which the petitioners and the CPSC would have everything turn in this situation.

D. More Satisfactory Means Are Available To Decide the Appropriate Forum for Litigation of This Kind.

Although petitioners and the CPSC have declined to recognize and utilize them, there are tools that are more than adequate for solving most of the problems of selecting an appropriate forum in reverse and direct FOIA cases, *i.e.,* the joinder requirements of Rule 19 and the transfer provisions of 28 U.S.C. § 1404(a).[17] While those two pro-

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[17] In *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 77 (1961), this Court noted the availability of its original juris-

visions do not automatically guarantee a solution in every case, their flexibility offers the best chance to consolidate related litigation in one court, particularly in light of the fact that most governmental agencies can be sued by submitters in the District of Columbia, and the FOIA allows all actions under the Act to be brought there. *See* 5 U.S.C. § 552(a)(4)(B).[18] By way of contrast, it is highly fortuitous that all of the submitters were incorporated in Delaware so that all thirteen actions could be consolidated there. As noted above, p. 7, *supra,* no other factor favored litigation there, yet a rigid first-to-file rule would require the Delaware court to try these cases.

Rule 19 is an important tool in resolving these problems because it mandates consideration of three important interests: that of the defendant (the federal agency) in avoiding conflicting orders, that of the absent parties (either the submitters or the requesters as the case may be) in being heard, and the interest of the public and the courts in the efficient administration of justice and the avoidance of multiple litigation. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737-38 (1977). *See generally Provident Tradesmens Bank & Trust Co. v. Patterson, supra; Advisory Committee Notes to Rule 19,* 39 F.R.D. 89 (1966). In fact, the problems arose in this case because the manufacturers neither joined the requesters as required by Rule 19(a), nor complied with Rule 19(c) by explaining the reason for their nonjoinder. Additionally, although required to do so on its own

diction under Article 3, Sec. 2 of the Constitution that "wisely provided a way in which controversies between states can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law." *See also* 28 U.S.C. § 1335 (Federal Interpleader Act).

[18] Of course, Congress might provide for other legislative solutions that could eliminate these problems. *See* 26 U.S.C. § 6110(f).

motion, see *Provident, supra,* 390 U.S. at 111, the Delaware court did not inquire into the absence of the requesters. Nor did the government ever raise the Rule 19 issue even though it was plainly in its interest to attempt consolidation by any means, and it sought to avail itself of the transfer provisions of section 1404(a) only two and a half years after the Delaware suits were brought when the District of Columbia Circuit directed that the action there proceed on the merits.

The proper question, we submit, is not why the requesters did not intervene in Delaware, but why no one in Delaware made an effort to join them there, especially in light of the liberal service of process provisions of Rule 4(f) of the Federal Rules of Civil Procedure.[19] If all of the parties had been joined in a single forum, as they were in the District of Columbia, none of this litigation would have taken place. While it is understandable why the manufacturers would prefer to litigate against the stakeholder, rather than against those parties with truly adverse interests, there is no excuse for the CPSC's refusal to take adequate steps to avoid these difficulties. Permitting the action to proceed in the District of Columbia would not, as the petitioners and the government suggest, have resulted in the court refusing to permit a victorious party to enforce a final judgment. At most, a stay of the proceedings in Delaware would have been ordered, as has been done so often when similar suits are pending in different federal courts. Any interference with an "automatic" temporary

[19] Although declining to vacate the judgment below, the Third Circuit recognized that the interest of requesters "in the subject matter of this lawsuit is clear, and their joinder as parties in the district court would have been desirable. . . ." *GTE Sylvania, Inc. v. CPSC, supra,* 598 F.2d at 799.

restraining order of another court would hardly constitute the kind of serious failure to grant deference to the actions of a concurrent federal jurisdiction of which the petitioners and the CPSC complain so bitterly. If there is, as the government suggests (Br. 31, n.17), no case in which a federal court has ordered a litigant *not* to enforce an order of a coordinate court, it is because no one has sought to do so based upon the temporary restraining orders which are the foundation of petitioners' case here.

Had an effort been made to join the requesters in Delaware, and such effort been successful, requesters could have made a motion to transfer under 28 U.S.C. § 1404(a), and the court would have had to weigh the convenience and other factors that are relevant on such a motion. But having been joined under Rule 19, they could still make that motion, whereas if they intervened, they would have forfeited their right to seek a transfer to the District of Columbia. *See e.g., Commonwealth Edison Co. v. Train,* 71 F.R.D. 391, 394 (N.D. Ill. 1976). Even if they were not joinable in Delaware, as will occur in a number of cases, the government could seek a transfer, and if that were denied, Rule 19(b) would still be employed to determine whether the action should proceed. In such a case, the availability of another forum where all parties could be joined would be highly relevant. *Caldwell Mfg. Co. v. Unique Balance Co.,* 18 F.R.D. 258, 265 (S.D.N.Y. 1955). If despite the best efforts of the courts, the agency, and the submitters, all interested parties could not be joined in a single district, the action brought by the submitters might nonetheless proceed, with or without the intervention of the requesters. While requesters believe that principles of due process would preclude a decision in Delaware made in their absence from binding them, the *stare decisis* effect of that ruling would nonetheless be considerable, and it

would hardly leave the submitters with a wholly useless decree. Even though a court of equity "cannot lawfully enjoin the world at large, no matter how broadly it words its decree," *Alemite Mfg. Corp. v. Staff,* 42 F.2d 832 (2d Cir. 1930) (L. Hand), it still would be able to issue an order that would give substantial although not total protection to a submitter who emerged victorious in a reverse FOIA case in which, despite the good faith efforts of the submitter, a known requester could not be joined.

Although requesters believe that Congress intended that their rights be given great weight in controversies such as this, they recognize that in come cases fairness will dictate that the interests of submitting parties need to be accommodated. They believe, moreover, that the result which they urge in this case would provide the needed flexibility to achieve justice in such a case. Thus, if a requester who had tired of agency delay had filed suit, there might be an occasional case in which the requester's choice would not be automatically honored, and the equities would have to be balanced considering the alternatives available through Rule 19 and section 1404(a). In our view, there is no more reason, for example, to allow individuals residing in Alaska seeking access to the personal files of the FBI on Dr. Martin Luther King, Jr. which are in Washington, to have the absolute right to have that issue litigated in Anchorage, where there is reason to doubt the vigor of the defense that may be raised, than it is to tell an academic researcher living in the District of Columbia who is investigating corporate bribery that he or she must go to California to litigate access to the documents that Lockheed submitted to the Securities and Exchange Commission regarding its overseas payments.

Of course, in many cases in which either the requester or the submitter has won the race to the courthouse, the

"loser" may be willing to allow the government to defend its interest when there is a reasonable expectation that the representation will be adequate, and/or where the party is unable to obtain independent counsel to provide assistance. But when, as here, a party has expressly denied the adequacy of the government's representation by filing its own lawsuit within four days of the earliest possible date on which the extent of the controversy could be known, the courts should adopt a flexible approach to the situation and presume that the action should proceed in the forum required by the interests of justice, rather than where a race to the courthouse is won by the only side allowed to enter.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FOR ARGUMENT

No. 78-1248

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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TABLE OF CONTENTS

Page

1. The Requesters Mistakenly Attempt To Eliminate the Issue of Whether Information Is Being "Improperly Withheld" by the CPSC Within the Meaning of the FOIA 2
2. The Requesters Endeavor To Circumvent the Issues Presented for Decision by Inviting This Court To Disregard the Impact on This Case of the Permanent Injunction and Earlier Orders Entered in the Delaware Litigation 4
3. The Requesters Would Evade Consideration of Established Principles of Comity by Gross Speculation as to How Future Disputes Between Requesters and Submitters Will Be Presented for Judicial Resolution 6
4. Giving Preclusive Effect to the Delaware Permanent Injunction Does No Violence to the Requirements of Due Process 7
5. The Absence of a Justiciable Case or Controversy Between the CPSC and the Requesters, Both of Which Agree That the Information Should Be Released, Cannot Be Cured (a) by Contriving a Dispute as to the Effect of the Delaware Orders or (b) by Joining Third Parties Against Which There Can Be No Relief 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

Atkins v. *United States*, 556 F.2d 1028 (Ct.Cl. 1977) (*en banc*) (*per curiam*), *cert. denied*, 434 U.S. 1009 (1978) 13

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, —— U.S. ——, 99 S.Ct. 1551 (1979) ...9, 10

Cheng Fan Kwok v. *Immigration & Naturalization Service*, 392 U.S. 206 (1968) 13

Page

Colorado River Water Conservation District v. *United States*, 424 U.S. 800 (1976) 7

Foti v. *Immigration & Naturalization Service*, 375 U.S. 217 (1963) 13

Great Northern Railway v. *National Railroad Adjustment Board*, 422 F.2d 1187 (7th Cir. 1970) 6-7

Montana v. *United States*, 440 U.S. 147 (1979) 9

Moore v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971) (*per curiam*) 10

Muskrat v. *United States*, 219 U.S. 346 (1911) 10

North Carolina State Board of Education v. *Swann*, 402 U.S. 43 (1971) 13

Pasadena City Board of Education v. *Spangler*, 427 U.S. 424 (1976) 12-13

Purolator Products, Inc. v. *FTC*, 389 U.S. 1045 (1968) 13

Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 (1961) 10

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974) 5

Sibron v. *New York*, 392 U.S. 40 (1968) 14

Trainor v. *Hernandez*, 431 U.S. 434 (1977) 5

United States v. *Johnson*, 319 U.S. 302 (1943) (*per curiam*) 13, 14

United States v. *Lovett*, 328 U.S. 303 (1946), *aff'g* 66 F. Supp. 142 (Ct.Cl. 1945) 12

United States v. *United Mine Workers*, 330 U.S. 258 (1947) 4

Walker v. *Birmingham*, 388 U.S. 307 (1967) 4

Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961) 5

Page

STATUTES AND RULES:

United States Constitution, Article III 2, 10, 11, 15

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) 3

Rule 19, *Federal Rules of Civil Procedure* 12

MISCELLANEOUS:

7A Wright & Miller, *Federal Practice and Procedure: Civil* § 1917 (1972) 15

IN THE

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OCTOBER TERM, 1979

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Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS

In our opening brief we showed that the action brought by respondents ("requesters") should not be permitted to proceed and that any one of three independent grounds requires reversal of the judgment of

the Court of Appeals and dismissal of the complaint. In summary, those grounds are: (1) there is no case or controversy as required by Article III of the Constitution; (2) there has been no "improper withholding" within the meaning of the Freedom of Information Act ("FOIA") by the Consumer Product Safety Commission ("CPSC") and thus the requesters' complaint fails to state a claim upon which relief can be granted; and (3) the Court of Appeals erred in refusing to dismiss the requesters' action under established principles of comity and finality of judgments. We do not believe that the requesters have properly focused on these issues. Indeed, the second issue is virtually ignored and the others are treated against a backdrop of hypothetical facts and speculative fears that a reversal of the decision below will result in a Pandora's box of future races to the courthouse.

The requesters also argue that application of principles of comity here would do violence to their due process rights. Moreover, they attempt to circumvent petitioners' ("manufacturers") case or controversy point by contriving an imaginary disagreement as to the effect of the Delaware orders and suggesting that the joinder of the manufacturers supplies whatever adverseness may be lacking between the requesters and the agency. We shall demonstrate below the flaws in each of these arguments as well as deal with the broad points discussed by the requesters.

1. The Requesters Mistakenly Attempt To Eliminate the Issue of Whether Information Is Being "Improperly Withheld" by the CPSC Within the Meaning of the FOIA.

Contrary to the requesters' claim (Resp. Br. 2, 16), the manufacturers do not rely on only "two [independent] legal theories" to support their position that the requesters' action should not be permitted to proceed. In thus mischaracterizing our position and also in refashioning the Questions Presented (Resp. Br. 2), the requesters omit as an independent issue in this case an important question presented by the manufacturers (Pet. Br. 4), namely, whether information is "improperly withheld" within the meaning of the FOIA, 5 U.S.C. § 552(a)(4)(B), by an agency that has not released the information solely because it has been permanently enjoined from doing so by another district court.

This independent issue has been discussed at length in our opening brief, in which we established that there is no basis in the FOIA or its history for concluding that compliance with a judicial decree permanently enjoining disclosure can be parlayed into a claim of "improper withholding" (Pet. Br. 30-36). We also demonstrated that the equitable discretion retained under the FOIA enables a court to respect an injunction of a coordinate federal court (Pet. Br. 36-38).

The requesters do not challenge, in any real sense, our position on the "improper withholding" issue. Instead, they seek to bypass the issue by asking this Court to ignore the Delaware preliminary and permanent injunctions and to treat the temporary restraining orders as never having been operative (Resp. Br. 32). By this tactic, the requesters are guilty of the very thing they accuse the manufacturers of—"asking this Court to close its eyes to reality" (Resp. Br. 29). There never has been a moment since the requesters brought their suit in the District of Columbia that the CPSC has not been enjoined from honoring their FOIA request. The requesters' approach also ignores

established legal principles. There can scarcely be a question that even temporary restraining orders must be obeyed. *Walker* v. *Birmingham,* 388 U.S. 307 (1967); *United States* v. *United Mine Workers,* 330 U.S. 258, 289-95 (1947).

Thus the reasons the requesters proffer for brushing aside the "improper withholding" issue, and announcing that "it will not be discussed further by requesters" (Resp. Br. 33), cannot withstand scrutiny. The fact is that the CPSC is prohibited from disclosing the information at issue by a permanent injunction entered by a court of competent jurisdiction. Accordingly, the requesters simply are not entitled to relief under the FOIA.

2. The Requesters Endeavor To Circumvent the Issues Presented for Decision by Inviting This Court To Disregard the Impact on This Case of the Permanent Injunction and Earlier Orders Entered in the Delaware Litigation.

In their brief, the requesters play a game of "make believe" in which they vainly strive to turn back the clock. Both in their second Question Presented (Resp. Br. 2) and in their argument that "the Court's Focus Should Be On the Cases As They Stood When This Action Was Filed, Disregarding The Issuance Of The Automatic Restraining Orders in Delaware" (Resp. Br. 30), they ask the Court to decide this case on a hypothetical set of facts. Thus, the requesters would (1) erase the permanent injunction issued by the Delaware District Court and now affirmed in its entirety by the Third Circuit and (2) even wipe the slate clean of the preliminary injunction and temporary restraining orders.

The basic difficulty with the requesters' suggested approach is that it is inconsistent with the January 16, 1978 order of this Court vacating the Court of Appeals' first judgment in this case:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit *for further consideration in light of the permanent injunction* entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104." (A. 62; emphasis added.)

There can be no serious doubt that the focal point of decision in this case must be the present, with a permanent injunction in place. This is especially so since the most recent grant of certiorari for review of the Court of Appeals' judgment was responsive to a Petition that stressed in every Question Presented that a Delaware permanent injunction was outstanding. The requesters attempt to justify their approach by suggesting that a decision based on a fictitious set of facts that excludes the Delaware permanent injunction might have greater precedential value (Resp. Br. 33). In view of the rule against advisory opinions, this proposal could not be more devoid of merit.[1]

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[1] The decisions cited by the requesters (Resp. Br. 30-31)—*Trainor* v. *Hernandez,* 431 U.S. 434 (1977); *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208 (1974); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961)—have no relevance to the requesters' argument that the permanent injunction entered by another court be disregarded. It is not questioned that the Court can and does overturn lower court decisions on the merits when it discovers fatal threshold defects going to the power or propriety of rendering such decisions, as it did in the three instances relied upon by the requesters. However, that is not the issue here.

3. The Requesters Would Evade Consideration of Established Principles of Comity by Gross Speculation as to How Future Disputes Between Requesters and Submitters Will Be Presented for Judicial Resolution.

The requesters make a misguided attempt to cast this case in most unrealistic "race to the courthouse" terms (*e.g.*, Resp. Br. 2, 16, 19, 41-47). But the requesters cannot even settle in their own minds how to frame the frightening prospect they imagine will occur.[2] Hence, on a single page (Resp. Br. 19; *see also id.* at 43-45), they simultaneously predict that if the manufacturers prevail the appalling results will be:

> "[H]ence [submitters] can always win the race to the courthouse."

> "If a race to the courthouse is to be the method of deciding the proper forum, requesters in future cases will win most races . . . ."

We believe that the requesters would have advanced the resolution of the issues by a more serious effort to address the questions of orderly judicial administration raised by the District of Columbia Circuit's decision.[3] In that decision, the Court of Appeals directed

[2] On another front, the requesters cannot make up their minds as to the significance of temporary restraining orders ("TRO's") in reverse-FOIA cases. On the one hand, they assert that such TRO's should be disregarded as "automatic" (Resp. Br. 18, 30, 32). But on the other, they propose that these same TRO's are deserving of such regard that the CPSC should be faulted for consenting to their entry in the Delaware litigation (Resp. Br. 38).

[3] Thus the requesters assert that the doctrine of comity, for example, "applies only when the parties are the same in both actions . . ." (Resp. Br. 35; *see also id.* at 18). No effort is made to deal with the many cases cited by the manufacturers (Pet. Br. 46-47) and the Solicitor General (Sol. Br. 24-31) in their opening briefs showing that this view is in error. *Great Northern Ry.* v. *Nat'l R.R. Adjustment Bd.*, 422 F.2d 1187 (7th Cir. 1970), is the sole case relied on by the requesters. Their reliance is misplaced. *See* Pet. Br. 47 & n.29.

its District Court to disregard the Delaware permanent injunction and forge ahead on a collision course with the Delaware District Court and, now, the Third Circuit (Pet. Br. 4). It is our position that the Court of Appeals' direction to the court below is unwarranted under established principles of comity and that the Court of Appeals' reasons for departing from those principles are unsound (Pet. Br. 42-52). These are, in our judgment, the issues that need to be addressed.[4]

4. Giving Preclusive Effect to the Delaware Permanent Injunction Does No Violence to the Requirements of Due Process.

The manufacturers' third independent ground for reversal of the court below is that established principles of comity and finality of judgments mandate that the District of Columbia District Court not proceed to a trial on the merits. The requesters assert that such a result does violence to due process (Resp. Br. 18,

[4] This Court, in *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), recognized that unlike the general approach governing state-federal concurrent jurisdiction, as between federal courts "the general principle is to avoid duplicative litigation." In their zeal to cast this case in terms of a race to the courthouse, the requesters erroneously conclude that "[o]f particular relevance to this case is that, although the federal action was first filed in *Colorado River*, jurisdiction went to the state court . . ." (Resp. Br. 47). In fact, the state proceeding was the prior case, and was, in the words of this Court, "a single continuous proceeding for water rights adjudication which antedated the suit in District Court." 424 U.S. at 819. In any event, as both the Solicitor General and the manufacturers pointed out in their opening briefs (Sol. Br. 18; Pet. Br. 43), *Colorado River* supports the view that principles of comity preclude the District of Columbia suit from now going forward.

36-41). No similar due process objection is interposed to the other two independent grounds the manufacturers rely on for reversal.

We demonstrated in our opening brief that principles of comity support prohibiting relitigation of a matter settled by a permanent injunction against the CPSC in another forum (Pet. Br. 42-62). We also pointed out that this case does not require the pronouncement of a general rule of preclusion of relitigation by FOIA requesters who have knowledge of reverse-FOIA proceedings but fail to intervene. This is so because of the particularly compelling facts presented by the deliberate choice of these two sophisticated and litigation-oriented requesters not to intervene in nearby Delaware, an admittedly convenient forum.[5] *See* Pet. Br. 54-55. In addition, the fact that this is the first time that this Court has considered the question of judicial administration of reverse and direct FOIA suits counsels in favor of proceeding cautiously.[6]

We find difficult to comprehend the requesters' continued refusal to accept any responsibility for their deliberate choice not to intervene in Delaware but to proceed with a duplicative lawsuit instead, while at the same time pressing "due process" objections. Indeed, they themselves note "the breadth of the opportunity to intervene today in federal courts under Rule

[5] Respondents concede that "it is true that in this case the disadvantages to the requesters based on the location of the proceeding in Delaware are not very severe . . ." (Resp. Br. 42).

[6] The District of Columbia Circuit was not so circumspect. Its attempt to fashion sweeping procedural rules applicable to FOIA litigation is not even acceptable to the requesters, who themselves disavow as untenable the class action solution gratuitously offered by that court (Resp. Br. 13 n.4).

24" (Resp. Br. 41 n.12). We believe that there is no justification for experienced litigators such as these requesters not to have availed themselves of this broad opportunity so as to avoid the very procedural tangle of which they now complain (Resp. Br. 30).

As we have already noted (Pet. Br. 53 n.36), and as the Solicitor General has fully demonstrated (Sol. Br. 24-31), due process requires only that persons have an *opportunity* to be heard. *E.g., Montana* v. *United States,* 440 U.S. 147, 153-54 (1979). Nonparties, such as the requesters, who seek relief in subsequent litigation that effectively would nullify the results of prior litigation in which their interests were adequately represented [7] and in which they deliberately chose not to intervene can be barred from relitigation without doing any violence whatsoever to their due process rights.[8]

[7] Requesters attempt to equate the CPSC with a bank or insurance company or other true "stakeholder" in order to deflect the effect of the CPSC's representation of their interest in the disclosure of the information in question (*e.g.*, Resp. Br. 19, 38). Unlike a true stakeholder, however, the CPSC is not a disinterested third party in a dispute by others over a corpus, as is attested to by the Solicitor General's recent petition for a writ of certiorari (No. 79-521) seeking this Court's review of the Third Circuit's affirmance of the Delaware injunction.

[8] The requesters' reliance (Resp. Br. 40-41) on *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys., Inc.*, —— U.S. ——, 99 S. Ct. 1551 (1979), is misplaced. Columbia Broadcasting System ("CBS") sought only to supplement the 1950 amended consent decree controlling the activities of the American Society of Composers, Authors and Publishers (*id.* at 1558), and the 1966 amended consent decree controlling the activities of Broadcast Music, Inc. (*id.* at 1558 n.20) so as to require an *additional* alternative form of licensing to be available to licensees. *Id.* at 1559. Thus, far from seeking to nullify the earlier decrees (as the requesters would do here), CBS sought to extend the protection that they afforded. As the Solicitor General has pointed out at greater length in his brief

Finally, as the Solicitor General and the manufacturers have noted (Sol. Br. 26; Pet. Br. 52 n.35), the Delaware Court is still available to the requesters for any appropriate relief which circumstances warrant or due process requires.

5. The Absence of a Justiciable Case or Controversy Between the CPSC and the Requesters, Both of Which Agree That the Information Should Be Released, Cannot Be Cured (a) by Contriving a Dispute as to the Effect of the Delaware Orders or (b) by Joining Third Parties Against Which There Can Be No Relief.

We demonstrated in our opening brief (Pet. Br. 20-30) that the requesters' action is not justiciable under Article III of the Constitution, which requires "adverse parties whose contentions are submitted to the court for adjudication," *Muskrat* v. *United States*, 219 U.S. 346, 357 (1911). Specifically, we demonstrated that the requesters' action must be dismissed because both the requesters and the CPSC—the only defendant against which relief is or can be sought—desire precisely the same result, namely, release of the information to the requesters (Pet. Br. 21-24). *E.g., Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48 (1971) (*per curiam*).

(Sol. Br. 29-30), there is a vast difference between permitting subsequent litigation "when the second suit seeks relief that would effectively nullify the decree of the first court" (*id.* at 30) and permitting subsequent litigation when the second suit "seeks relief that is merely logically inconsistent with the prior judgment" (*id.* at 29). *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961), which the Court cited in the *Broadcast Music, Inc.* decision, 99 S. Ct. at 1559, likewise involved private litigants who sought to supplement the consent decree relief obtained by the government, which they believed "did not go far enough." 366 U.S. at 687.

The requesters seek to avoid application of these principles by offering two bootstrap theories of Article III jurisdiction, neither of which has any merit.

Initially, the requesters contend that there is a case or controversy because they and the CPSC have a "continuing disagreement as to the effect of the Delaware orders . . ." (Resp. Br. 21; *see id.* at 16). However, it is indisputable that the CPSC is permanently enjoined, and was temporarily enjoined, from releasing the information sought by the requesters. It is also indisputable that the District of Columbia Court of Appeals has remanded the case to the District Court solely for resolution of the requesters' right to the materials. ("This case, therefore, must finally continue toward a decision on the merits . . ." A. 85-86.) It was of course the requesters' asserted right to the information and not the effect of the Delaware orders that they brought to the District Court to adjudicate (*see* A. 19). But where a party seeks relief from another party which agrees that the requested relief should be granted, there is nothing for a court to adjudicate. Under these circumstances, not only would district court action "have anomalous results," as the Solicitor General argues (Sol. Br. 21 n.10), it would be wholly inconsistent with Article III.

The requesters rely primarily on their second bootstrap argument (Resp. Br. 16, 22), in which they resurrect a jurisdictional joinder theory that Judge Richey found "ingenious" but unavailing (A. 30). Even the District of Columbia Court of Appeals, in all its pains to find an Article III case or controversy, did not quarrel with Judge Richey's conclusion (Pet. Br. 25 n.12). As Judge Richey noted (A. 30), the requesters' theory, at bottom, is that their

disagreement with the manufacturers over whether the information should be disclosed provides "the missing jurisdictional ingredient of case or controversy" between them and the CPSC.

This theory is plainly incorrect for two interrelated reasons, which we noted in our opening brief (Pet. Br. 25 n.12). First, the requesters seek no relief from the manufacturers and, indeed, cannot, since the requesters have no cause of action against them. Second, joinder under Rule 19 of the Federal Rules of Civil Procedure requires preexisting jurisdiction over the cause of action, and absent a case or controversy between the requesters and the CPSC, there is no such preexisting jurisdiction. In short, Rule 19 cannot be used to extend the jurisdiction of the federal courts (Pet. Br. 25 n.12). The requesters put forward no valid reason for departing from these established principles. Nor do the authorities they cite support their position.

United States v. *Lovett,* 328 U.S. 303 (1946), relied on by the requesters (Resp. Br. 16, 24), is not apposite. The United States, the defendant, had refused to disburse funds to the plaintiffs, even though the Department of Justice felt that the prohibitory statute was invalid. Special counsel appeared as amici to defend the statute, "representing the House, the Congress, the United States." 66 F. Supp. 142, 143 (Ct. Cl. 1945). Consequently, it is clear that there was adverseness, since the executive branch refused to pay the funds and special counsel, also representing the "United States," maintained that the United States had no obligation to do so.[9] This Court has experienced other instances

[9] The requesters cite a number of other cases that are equally irrelevant. In *Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. 424 (1976) (Resp. Br. 17, 23), the United States intervened in a private school desegregation suit pursuant to a special statute, 42 U.S.C. § 2000h-2, which provided that "the United States shall be entitled to the same relief *as if it had instituted the action.*" 427 U.S. at 430 (emphasis added). Thus, there clearly was adverseness between the United States and the school board defendants. Likewise, nothing could be more plain than the adverseness between the parties plaintiff and parties defendant in *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43 (1971) (Resp. Br. 17, 23), regarding the constitutionality of the North Carolina Anti-Busing Law at issue.

The parties also were clearly adverse in *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977) (*en banc*) (*per curiam*), *cert. denied,* 434 U.S. 1009 (1978) (Resp. Br. 24 n.7), in which the government vigorously opposed the claims of the plaintiffs, federal judges, for additional compensation.

Similarly, the deportation cases relied on by the requesters (Resp. Br. 24 n.7), *Cheng Fan Kwok* v. *Immigration & Naturalization Serv.,* 392 U.S. 206 (1968) and *Foti* v. *Immigration & Naturalization Serv.,* 375 U.S. 217 (1963), stand for nothing more than the ability of truly adverse parties to agree that a court has jurisdiction to resolve their dispute. Quite unlike the CPSC here, which agrees that the information should be disclosed to the requesters, in both *Cheng Fan Kwok* and *Foti* the government sharply disagreed as to whether the plaintiff-alien was entitled to the relief he sought (in *Cheng Fan Kwok,* a stay of deportation, and in *Foti,* a suspension of deportation).

where different departments or agencies of the United States have appeared before it with opposite attitudes as to whether a judgment should be affirmed or reversed.[10]

The requesters miss the thrust of *United States* v. *Johnson,* 319 U.S. 302 (1943) (*per curiam*) (Resp. Br. 23 n.6). Roach, the collusive plaintiff, sued his landlord for excessive rent collections. The defendant asserted that the Emergency Price Control Act of 1942

[10] *E.g., Purolator Products, Inc.* v. *FTC,* 389 U.S. 1045 (1968) (Solicitor General, as amicus, contended that FTC had erred in disposition of price discrimination proceeding and urged that certiorari be granted; FTC opposed grant of certiorari).

was unconstitutional. Significantly, when the United States intervened, it not only moved to dismiss the suit as collusive, it also argued before the district court and this Court in support of the Act's constitutionality. 319 U.S. at 303. Under the requesters' theory, the Court would have decided the merits in *Johnson,* since, as the requesters put it (Resp. Br. 22), there was a "presentation of both sides of the controversy to the court." But the Court did not. It ordered the case dismissed for want of adverseness. 319 U.S. at 305. *See also* Pet. Br. 22, 23.

The requesters' reference to *Sibron* v. *New York,* 392 U.S. 40 (1968), likewise fails to advance their position (Resp. Br. 25). When the federal or a state government brings a criminal proceeding against a defendant it can hardly be said that there is no adverseness. If at some later point on appeal the prosecutor decides that the trial court committed reversible error, there can be no question that the judiciary, in protection of its own processes of criminal justice, has the right to scrutinize the propriety of vacating the conviction.

The suggestion that the consent decrees negotiated by the Securities and Exchange Commission or the Antitrust Division expose a fallacy in petitioners' reasoning is equally specious. Litigating parties who are truly adverse may ultimately consent to injunctive orders reflecting the resolution of a genuine controversy. But that does not alter the fact that there was an initial controversy. If there had not been, the arrangement would have been collusive and an abuse of the judicial process.[11]

[11] There is no "inconsistency," as the requesters would have it (Resp. Br. 27), between the manufacturers' Article III position and their position that the requesters should have intervened on the side of the CPSC in the Delaware litigation. There plainly was adverseness in that litigation between the manufacturers and the CPSC; the requesters' intervention as defendants was not needed to confer Article III jurisdiction. Indeed, just as with joinder, intervention may not be so employed. 7A Wright & Miller, *Federal Practice and Procedure: Civil* § 1917, at 584-85 (1972). *See* Pet. Br. 25 n.12.

Finally, reminiscent of the requesters' ambivalent "race to the courthouse" argument, which we discuss at p. 6 *supra,* the requesters concern themselves with the permutations of theoretical FOIA actions seeking access to documents which an agency is willing to produce as well as documents which it refuses to disclose (Resp. Br. 26-27). The requesters wonder aloud whether they can defeat an adverse ruling by this Court by bringing a contrived suit for both categories of documents, so that the dispute as to the refused documents will permit them to support a fictitious lawsuit as to other documents which the agency would gladly furnish were it not enjoined from doing so. We would hardly believe that the "well-informed" requesters to whom reference is made (Resp. Br. 27) would play that game or expect by doing so successfully to avoid the impact of an outstanding injunction entered by another tribunal.

In summary, the requesters' numerous efforts to circumvent the established principles of law urged by the manufacturers are of no avail. The lack of adverseness between FOIA requesters and an agency that desires to release the requested information but is enjoined from doing so cannot be cured by contriving a disagreement as to the meaning of the injunction or by the presence of parties against which there can be no relief.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, it is respectfully requested that the decision of the District of Columbia Court of Appeals be reversed and that the requesters' complaint be dismissed.

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